(22,327)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 141.

EMILIA RIJOS CORDOVA, APPELLANT,

vs.

TERESA FOLGUERAS Y RIJOS ET AL.

APPEAL FROM THE SUPREME COURT OF PORTO RICO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 25, 1912.

1 In the Supreme Court of Porto Rico.

No. 470.

EMILIA RIJOS CÓRDOVA, Plaintiff & Appellant,
vs.
TERESA, JOSÉ, MARIANA, ENCARNACIÓN and RAFAELA FOLGUERAS y Rijos, Manuel Benito de Peña and Herminia Rijos Laza, Defendants & Respondents.

Appeal from a Judgment Rendered by the District Court for the Judicial District of San Juan, Porto Rico.

Transcript of Record on Appeal to the Supreme Court of the United States.

Record of the proceedings of the Supreme Court of Porto Rico in the above entitled case, which is an action involving a judicial declaration of the status of natural child, a liquidation of inheritance, and delivery of real property, and the proceeds of fruits and rents thereof, the said case having been disposed of at the third regular term of said court, in the year 1910, the following papers having been filed, and the following proceedings having been had therein, to wit:

2 ISLAND OF PORTO RICO,
Judicial District of San Juan:

In the District Court.

Civil No. —.

No. —.

EMILIA RIJOS CÓRDOVA, Plaintiff,
vs.
TERESA, JOSÉ, MARIANA, ENCARNACIÓN Y RAFAELA FOLGUERAS Y Rijos, Manuel Benito de Peñas, y Hermania Rijos Laza, Defendants.

Action Involving a Judicial Declaration of the Status of Natural Child; a Liquidation of Inheritance; and Delivery of Real Properties and the Proceeds of Fruits and Rents Thereof.

Complaint.

Now comes before the Court, Emilia Rijos Córdova, of age and a resident of San Juan, by Jacinto Texidor and Domingo M. Massari, her counsel, and brings this suit, and respectfully alleges and states:

1. That the plaintiff is a natural daughter of Don Santiago Rijos Correa and Doña Emilia Córdova; and that the said Santiago Rijos and Emilia Córdova, the latter being a widow and the former unmarried, intended to contract a legitimate marriage, and in good faith believed to have so contracted a marriage, before the priest Eulogio Clemente de Saldaña, on the 2nd of June, 1863, at San Juan, Porto Rico; and that from this date they both lived together as if they were married, and under the belief that their union
3 had been made by a marriage, and publicly enjoyed the consideration of legitimate husband and wife. And the plaintiff alleges that as a result of said union between Don Santiago Rijos y Correa and Doña Emilia Córdova, two children were born: one named José, who died in childhood, and the other, the plaintiff herein.

2. The plaintiff alleges that, ever since she was born, Don Santiago Benito Rijos publicly acknowledged her as his daughter, giving her the title of legitimate daughter, and always attending to the support and needs of the plaintiff, as a true affectionate father, and calling her his daughter in his conversations and correspondence.

3. The plaintiff further alleges: that Santiago Benito Rijos y Correa died suddenly on the 29th day of April, 1869, without having made any will, though he was ready to make the same in favor of the plaintiff and of the mother of the latter, Doña Emilia Córdova, for which purpose he had already given his instructions to his Notary.

4. The plaintiff alleges: that Doña Encarnación, Doña Mariana and Doña Rafaela Rijos y Correa, who are sisters of Don Santiago Benito Rijos y Correa, and the only members of his family living at the time when the plaintiff was born, had knowledge of the birth of the plaintiff and of her status as daughter of Don Santiago Benito, and though they denied the plaintiff the status of legitimate daughter of the said Santiago Benito, they considered and acknowledged her as his natural daughter.

5. The plaintiff further alleges: that to her father Santiago Benito Rijos y Correa belonged, as inheritance from his parents Juan Rijos and Rafaela Correa, one fifth of the properties of the said inheritance, which, according to the best information and belief of the plaintiff, was constituted by the sugar cane plantation known
4 as "Santa Elena," situated in Toa-Baja; by an estate known as "El Higuillar," in the same jurisdiction; by the house now occupied by the "Ateneo de Puerto Rico" and "Casino Español de Puerto Rico," and by other houses in San Juan, with regard to which the plaintiff has been unable to secure reliable information.

6. The plaintiff alleges: that when Don Santiago Benito Rijos died, he had no other descendants who could inherit from him but the plaintiff and another natural daughter, who is the defendant Herminia Rijos Laza, and that Doña Mariana, Doña Rafaela and Doña Encarnación Rijos, Disregarding absolutely the rights of the plaintiff Emilia Rijos, appropriated to, and divided among them-

selves, the inheritance of Don Santiago Benito Rijos, and gave a small participation therein to the other natural daughter Herminia Rijos, and that they took possession of all the properties and interests, owned by the said Don Santiago, and of those which belonged to him by inheritance from Doña Rafaela Correa, giving also a small participation in said properties to the children and heirs of Don Eduardo Rijos Correa.

7. The plaintiff alleges: that according to her best information, the defendants herein are now in possession of the properties and interests belonging to Santiago Benito Rijos, as above stated, and that they are in said possession under the following titles:

Manuel Benito de Peña, as heir and legatee of Doña Encarnación Rijos and of Doña Rafaela Rijos.

The defendants by the names of Fulgueras y Rijos, as heirs of Doña Mariana Rijos and as heirs and legatees of Doña Rafaela Rijos, the amount of their respective inheritances and bequests, the plaintiff being unable to fix.

Doña Herminia Rijos Laza as natural daughter of Santiago Rijos.

And the Succession of Eduardo Rijos as heirs and repre-
5 sentatives of the latter.

And that all of the above named persons have accepted said inheritances purely and simply, not only with regard to the rights of their principal in issue, but also with regard to his obligations.

8. The plaintiff alleges: that all of the defendants herein are in possession of the properties constituting the inheritance of Don Santiago Benito Rijos, holding the same interests therein as their respective ancestors appropriated to themselves, and that the defendant Herminia Rijos possesses the interest which was therein adjudicated to her; and that every one of the said defendants had knowledge, at the time they accepted the said properties, regarding the status of the plaintiff herein, as natural daughter of Santiago Benito Rijos.

9. The plaintiff alleges: that Doña Encarnación and Doña Rafaela Rijos died in San Juan, Porto Rico, after the distribution of the properties of the inheritance of Don Santiago Benito Rijos had been made.

10. This plaintiff alleges: that ever since she became of age, she has not failed to make efforts, extrajudicially, with regard to the defendants, and, formerly, as to their ancestors, so as to obtain the interest belonging to her in the inheritance of Don Santiago Benito, and to obtain her recognition as daughter of the latter, though in the character of legitimate daughter, which status the plaintiff believed she possessed; but Doña Mariana, as well as Doña Encarnación and Doña Rafaela Rijos, and, afterwards, the defendants herein, have refused to give the plaintiff any participation whatsoever in the aforesaid inheritance, though they regarded her as daughter of Don Santiago Rijos, denying her, however, the character of legitimate daughter.

11. The plaintiff alleges: that this action is not brought
6 against the children and heirs of Don Eduardo Rijos y Correa because they have shown themselves ready to give to the

plaintiff such participation in the properties of the inheritance of Santiago Rijos, as might belong to her; and that such is the best information and belief of the plaintiff with regard thereto.

12. The plaintiff alleges: that she has been, during all her life, in constant possession of the status of daughter of Santiago Benito Rijos, which possession has been established by direct recognition made by the latter, and direct acts executed by him, though under the belief, which he had, that the plaintiff was his legitimate daughter.

13. The plaintiff further alleges: that the defendants have possessed the interests belonging to Don Santiago Benito Rijos in the real properties above described, without good faith, and for a length of time less than twenty years.

Wherefore the plaintiff prays the Court to render judgment in her favor, declaring her to be a recognized natural daughter of Santiago Benito Rijos y Correa, and to adjudge and decree that the defendants must proceed to make, in connection with the plaintiff, a liquidation of the inheritance of the said Don Santiago, and to deliver to her one fifth of the properties constituting the said inheritance, and the rents produced by the same since the death of Don Santiago Benito Rijos.

J. TEXIDOR.
DGO. M. MASSARI.

7 In the District Court for the Judicial District of San Juan, P. R.

No. 2464.

EMILIA RIJOS CÓRDOVA, Plaintiff,
vs.
TERESA, JOSÉ, MARIANA, ENCARNACIÓN Y RAFAELA FOLGUERAS Y Rijos, Manuel Benito de Peñas, y Herminia Rijos Laza, Defendants.

Action Involving a Judicial Declaration of Natural Daughter, Liquidation of an Hereditary Share and the Delivery of an Interest in Real Properties and of the Proceeds of Fruits and Rents Thereof.

Demurrer to the Complaint.

Now comes the defendant in the above entitled case, Manuel Benito de Peña, by the undersigned attorney, and states:

That in opposition to the complaint he alleges the demurrer to the effect that the same does not state sufficient facts to constitute a cause of action, which demurrer is authorized by paragraph number 6 of Sect. 105 of the Code of Civil Procedure, and which demurrer is based on the following allegations:

It is stated in the 3rd fact of the complaint that Don Santiago Benito Rijos (who is deemed, in the said complaint, to be the father

of the plaintiff Emilia) died on the 29th of April, 1869, from which statement it necessarily follows as a conclusion that the
8 said Emilia was not born after the 29th of April, 1870, that is to say, after the lapse of three hundred days from the death of her alleged father.

Therefore, if the plaintiff Emilia was born on the 30th of April, 1870, she is to-day thirty eight years and a half old, and she reached her majority on the 30th of April, 1893, at which date the Spanish Civil Code was in force in Porto Rico, inasmuch as the same has been in force in this Island from the year 1890 up to the year 1902.

Section 137 of the Spanish Civil Code literally reads as follows:

"The actions for the acknowledgment of natural children can be instituted only during the life of the presumed parents, except in the following cases:

1. If the father or mother died during the minority of the child, in which case the latter may institute the action before the expiration of the first four years of its majority.

2. If, after the death of the father or mother, some instrument, before unknown, should be discovered in which the child is expressly acknowledged.

In this case the action must be instituted within the six months following the discovery of such instrument."

If it is a positive fact that Santiago Benito Rijos died during the minority of the plaintiff Emilia, then it is imperative to apply the provisions of paragraph number 1, of the said section 137, in order to determine what rights the said plaintiff could have exercised, and these rights are no other than the exercise of an action for her recognition, brought before the lapse of the first four years from her majority.

Even supposing that she, the plaintiff herein, was born on the 30th of April, 1870, (which is the must unfavorable date for the defendants' contentions), it follows that she attained her majority on the same day, the 30th of April, in the year 1893, and such being the case, it is evident that on the 30th of April, 1897, her action was fully and definitely extinguished.

9 As the said action for the recognition of natural daughter was not brought by the plaintiff Emilia, or, at least, it is not stated in the complaint that it was ever brought, it is evident that from the face of the complaint itself it appears that the action brought therein is barred by the Statute of Limitations, that a dead right is therein exercised, and that a fully and definitely extinguished claim is made therein.

The absolute want of facts, in the complaint, to constitute a cause of action in this suit, is still made more apparent by an examination of the allegations made by the plaintiff in the 10th fact of the complaint, wherein the following language is used: "Ever since the plaintiff became of age, she has not failed to make efforts, extrajudicially, with regard to the defendants, and, formerly, as to their ancestors, so as to obtain the interests belonging to her in the inheritance of Don Santiago Benito, and to obtain her recognition as daughter of the latter, though in the character of legitimate daugh-

ter * * *," from which words it plainly and evidently follows that she never made any efforts, nor brought any action whatsoever, for her recognition as natural daughter, which is the object of this suit, but to obtain her recogniton as legitimate daughter of Santiago Benito Rijos and Emilia Córdova.

It is not necessary to add here that the provisions of the said Spanish Civil Code with regard to the action to claim legitimate filiation greatly differ from those which govern natural filiation, the latter being governed by section 137 above cited, while the legitimate filiation is governed by the provisions of Sect. 118 of the same legal body.

If disregarding the provisions of the Spanish Civil Code, we refer to the Civil Code promulgated to be in force in Porto Rico on the 1st of July, 1902, our demurrer to the effect that the complaint does not state facts to constitute a cause of action, and that the action brought therein is barred, is strengthened by the fact that Sect. 199 of the said Code provides that an action to claim filiation may be brought at any time within two years after the child shall become of age, which certainly is not the case of the plaintiff herein, who is older than 38 years, as above stated.

By virtue of the foregoing I pray the court to consider the demurrer alleged herein, and, at the proper time, to sustain the same, imposing the costs upon the plaintiff.

San Juan, P. R., October 15, 1908.

WENCESLAO BOSCH,
Attorney for Manuel Benito de Peña.

In the District Court for the Judicial District of San Juan, P. R.

No. 2464.

EMILIA RIJOS CÓRDOVA, Plaintiff,

vs.

TERESA, JOSÉ, MARIANA, ENCARNACIÓN Y RAFAELA FOLGUERAS Y Rijos, Manuel B. de Peña y Herminia Rijos Laza, Defendants.

Action Involving a Declaration of Natural Daughter and Delivery of Inheritance, Together with the Proceeds of Fruits and Rents Thereof.

Judgment.

This case came on to be heard on the 14th of December, 1908, in open Court, on demurrer filed to the complaint to the effect that the same does not state a cause of action, on the ground that the action brought therein is barred, and both parties appeared by their counsel, who argued the case by a written brief filed in support of their respective claims, the question being thus submitted for decision.

And the Court, after proper consideration of the said pleadings and arguments of counsel, holds that the law is in favor of the demurrer, and therefore dismiss- the complaint of the said Emilia Rijos Córdova, without leave to amend the same, and with
12 costs. The Secretary shall issue the proper writ of execution. Rendered in open court on the 18th day of September, 1909, and entered on the 21st of the same month and year.

PEDRO DE ALDREY, *Judge.*

Attest:

A. MARIN MARIEN, *Secretary.*

13 ISLAND OF PORTO RICO,
Judicial District of San Juan:

In the District Court.

No. —.

EMILIA RIJOS CÓRDOVA, Plaintiff,
vs.
MANUEL BENITO DE PEÑA et al., Defendants.

Action Involving a Judicial Declaration of the Status of Natural Daughter and Other Petitions.

Notice of Appeal.

The Secretary of the District Court of San Juan, P. R.:

You are hereby notified that the plaintiff in the above entitled case takes an appeal to the Supreme Court of Porto Rico from the order which, in the nature of a judgment, was made by this court under date of the 18th of September, 1909, determining the demurrer filed to the complaint. And this appeal is taken from the whole of said order.

The attorney for the defendant has been notified with regard to this appeal.

San Juan, P. R., October 15th, 1909.

J. TEXIDOR,
Counsel for the Plaintiff.

Service of the foregoing notice of appeal accepted on this
14 15th day of October, 1909.

WENCESLAO BOSCH,
Counsel for Defendant.

Filed—Secretary's Office—Oct. 18th, 1909.—A. Marín Marien, Secretary.

I, Jacinto Texidor, counsel for Emilia Rijos in the above entitled case, hereby certifies that the above and foregoing is a faithful transcript of the record in the case.

San Juan, October 30th, 1909.

J. TEXIDOR.

15 In the Supreme Court of Porto Rico.

No. 470.

EMILIA RIJOS CÓRDOVA, Plaintiff & Appellant,
vs.
TERESA, JOSÉ, MARIANA, ENCARNACIÓN Y RAFAELA FOLGUERAS Y Rijos, Manuel Benito de Peña y Herminia Rijos Laza, Defendants & Respondents.

Appeal from the District Court for the Judicial District of San Juan.

Opinion of the Court, Delivered by Associate Justice del Toro.

SAN JUAN, P. R., *June 21st*, 1910.

The plaintiff and appellant, Emilia Rijos Córdova, filed a complaint in the District Court of San Juan against Teresa Folgueras et al., involving a judicial declaration of the status of natural daughter, etc. The defendants alleged that it appeared from the face of the complaint itself that the action brought therein was barred under the law cited by them, and the court, on the 18th of September, 1909, rendered judgment, dismissing the complaint, without leave to amend the same, and with costs against the plaintiff, which judgment was properly entered on the 21st of September, 1909, and from that judgment the present appeal has been taken.

16 Indeed, it appears from the complaint itself that when the same was filed, the plaintiff therein was, at least, thirty eight years old, because, though the date of the plaintiff's birth is not given therein, the said complaint states that the father of the plaintiff died on the 29th of April, 1869.

Such being the case, and inasmuch as it does not appear that the plaintiff had been recognized by her father in a solemn and authentic manner, nor that an action of filiation had been brought by her at any time before the institution of this suit, it is plainly evident that her right, if she ever had any, to obtain a judicial declaration involving her recognition as natural daughter, was prescribed by force of law, at the time when the complaint was filed.

"The right to execute for a personal obligation shall prescribe after the lapse of ten years; and a personal action, and the right to obtain an execution based thereon, shall prescribe after twenty years, and not less: but where the obligation is secured by a mortgage, or where the obligation is mixed, or both, personal and real, the debt shall prescribe after thirty years and not less: the above shall be observed notwithstanding the law of the King Don Alfonso, our progenitor, which provided that a personal action should prescribe after ten years. (Law 6. Tit. 15, Book 4. R.)"—Law V., Tit. VIII., Book XI., Nov. Recop., that is to say, the Law 63 of Toro.

"The actions for the acknowledgment of natural children can be instituted only during the life of the presumed parents, except in the following cases:

1. If the father or mother died during the minority of the child, in which case the latter may institute the action before the expiration of the first four years of its majority.

17 2. If after the death of the father or mother, some instrument, before unknown, should be discovered in which the child is expressly acknowledged.

In this case the action must be instituted within the six months following the discovery of such instrument."—Section 137 of the Spanish Civil Code of 1888 made applicable to Porto Rico in 1889.

"Actions and rights arising before this Code became operative, and not exercised, shall continue with the extension and according to the terms recognized by prior legislation, but shall be subject, with regard to the exercise, duration, and proceedings for enforcing them, to the provisions of this Code * * *"—4th Transitory Provision of the said Civil Code.

"An action to claim filiation may be filed at any time within two years after the child shall become of age, and it shall be transmitted to his heirs, if he should die during his minority, or in a state of lunacy. In these cases heirs shall have five years during which to enter an action." Sec. 199 of the Revised Civil Code in force in Porto Rico from 1902.

The 4th Transitory Provision of the revised Civil Code is the same as the 4th Transitory Provision of the Old Civil Code.

"Prescription, which began to run before the publication of this Code, shall be governed by the prior laws; but if, after this Code became operative, all the time required in the same for prescription has elapsed, it shall be effectual, even if according to said prior laws a longer period of time may be required." Sec. 1840 of the Revised Civil Code.

The presiding Justice of this Supreme Court, in the case of Gual vs. Gual, in construing the 4th Transitory Provision of the

18 Old Civil Code, which, as we have stated is the same as the 4th Transitory Provision of the Revised Civil Code, in delivering the opinion of the Court, used the following language:

"The right of the plaintiffs, Luis and Alfonso, to be recognized as natural children, having arisen before the Spanish Civil Code went into effect, and consequently the action to obtain the declaration of said right having so arisen, both right and action should continue with the extension and according to the terms recognized by prior legislation, but the said right and action cannot have a longer duration than that provided by the Code."

"The words extension and terms involve an entirely different meaning from that of the word duration, because the first two words determine the extent and virtue of a right or action, and the latter word refers to the time for which they shall have force and effect. There is no conflict or inconsistency in the provisions of the 4th Provision transcribed above. If any doubt might arise as to their meaning and import, the same will be vanished by a reference to the statement of motives which gave rise to the Spanish Civil Code, wherein the following is found: "But if it is proper to pay due respect to rights acquired under prior legislation, though not exer-

cised, no consideration of justice requires that the subsequent exercise thereof, as well as their duration and the proceedings for enforcing them should be exempted from the provisions of the Code."

In the case of Arnsterdam vs. Puente, decided on the 17th of June, 1910, Mr. Justice Wolf, in delivering the opinion of the Court, said:

"We think it is a fair deduction from the provisions of the Civil Code, heretofore in existence, as well as the practice and
19 jurisprudence in this regard that, without some authentic act which reveals the will of the father to give the child a status, the child has only a right of action to compel the father to confer such status. Section 135 of the Spanish Civil Code and section 189 of the Portorican Civil Code provide for the cases when a father is compelled to acknowledge his illegitimate child. He can be compelled by an action and the necessity for such action can only be said to be dispensed with when there is some solemn acts on the part of the father which show that this obligation has already been performed. It is the plain inference from these sections that although a father may have done, as in the case before us, any number of acts to show that a particular person was his child, yet he cannot be said to have acknowledged him according to the legal use of the word "acknowledgment." If he may be compelled, then, before such compulsion, the desideratum has not been attained. Until there is some solemn act or some declaration on the part of a court a child cannot be said to have acquired the civil status of an acknowledged natural child."

See also the opinion of this Court in the case of Puente vs. Puente, decided on the 18th of June, 1910.

The Supreme Court of the United States, said:

"This Court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. Hawkins v. Barney, 5 Pet. 451; Jackson v. Lamphire, 3 id. 280; Sohn v. Waterson, 17 Wall. 596; Christmas v. Russell, 5 id. 290; Sturges v. Crowninshield, 4 Wheat. 122. It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established." Terry v. Anderson, 95 U. S. 632.

20 Even accepting, with regard to the case at bar, that the plaintiff could have exercised the action of filiation at the time of the promulgation of the Revised Civil Code, and that the term allowed in Section 199 could be favorably applied to her, her action would still be barred, because the plaintiff allowed the said term to expire with excess without claiming the recognition of her right.

The legitimate child derives its status as such from the marriage of its parents. In order that marriage should be considered as contracted, it is not sufficient the intention of a man and a woman to contract the same, it is not sufficient for them to live together and to have begotten children; but it is necessary that the act should

be made in one of the solemn forms authorized by law, and that a solemn and authentic record thereof be taken.

The natural child derives its right as such from the recognition and in order that the recognition should be considered as made, and have legal effect, it is necessary that the same be made by the father in a solemn manner, with a firm will to make the same, and that a solemn and authentic record thereof be made.

When, under the Laws of Toro, a father executed some acts tending to establish his paternity, which acts, taken by themselves, did not constitute a solemn recognition, and of which no solemn and authentic record was made; when the cases provided for by section 137 of the Old Civil Code, occurred; and when those provided for by section 189 of the Revised Civil Code, now in force, arise, then the action of filiation should, and must, be brought, and the recognition should, and must, be made to appear by the solemn declaration of a competent court.

21 Parents who, in the fulfillment of their duties, should desire to transmit to their natural children their names and properties, or so much thereof as may belong to them, must make the recognition appear in a solemn and authentic manner, as, for instance, in the entry of birth, or in a public document, or in their will, or in a declaration made in solemn manner before an officer or court, etc., so that the recognized natural child may show its status as such, in the same manner as the legitimate child.

When parents do not make the recognition of their natural children in the manner above stated, then the children should bring the action of filiation and obtain a judicial declaration of their right.

If both, parents and children, were negligent, then they should be made to suffer the consequences of their acts and should blame themselves, and not the law which governed these questions of such a social transcendental importance in a uniform manner and for the good of all.

The appeal should be dismissed and the judgment affirmed.

EMILIO DEL TORO,
Associate Justice.

22 In the Supreme Court of Porto Rico.

Appeal from the District Court for the Judicial District of San Juan.

No. 470.

EMILIA RIJOS CÓRDOVA, Plaintiff & Appellant,

vs.

TERESA, JOSÉ, MARIANA, ENCARNACIÓN Y RAFAELA FOLGUERAS Y RIJOS, Manuel Benito de Peña y Herminia Rijos Laza, Defendants & Respondents.

Judgment.

SAN JUAN, P. R., *June 21st*, 1910.

This Court has carefully examined the transcript of record in this case, and considered the brief and arguments of the parties

herein, and for the reasons stated in the opinion filed herewith, decides to dismiss, as it does dismiss, the appeal taken herein and to affirm, as it does affirm, the judgment appealed from, which was rendered by the District Court of San Juan on the 18th of September, 1909.

And it is hereby ordered that a certified copy of this judgment and of the opinion on which the same is based, be transmitted to the District Court of San Juan for the proper effects.

Thus we command, pronounce and sign.

JOSÉ C. HERNANDEZ. J. H. MACLEARY.
ADOLPH G. WOLF. EMILIO DEL TORO.

23 In the Supreme Court of Porto Rico.

To Establish the Character of Natural Daughter of the Plaintiff; and Other Relief.

No. 470.

EMILIA RIJOS CÓRDOVA, Plaintiff-Appellant,
vs.
MANUEL BENITO DE PEÑA et al., Defendants-Respondents.

To the Supreme Court of Porto Rico and the Attorneys for the Defendants:

Please take notice, that the plaintiff in the above-entitled action hereby appeals to the Supreme Court of the United States, Washington, D. C., from the judgment therein made and entered in the said Supreme Court of Pto. Rico, on the 21 of June, 1910, in favor of said defendants, and against said plaintiff, and from the whole of said judgment. This appeal is taken on question of law.

San Juan, P. R., June 30, 1910.

ED. CAUTIÑO,
Attorney for Appellant.

Notified with copy, this — of July, 1910.

BOSCH & SOTO,
Attorneys for the Defendants Respondents.

24 In the Supreme Court of Porto Rico.

Appeal from the District Court for the Judicial District of San Juan.

No. 470.

EMILIA RIJOS CÓRDOVA, Plaintiff & Appellant,

vs.

TERESA, JOSÉ, MARIANA, ENCARNACIÓN Y RAFAELA FOLGUERAS Y Rijos, Manuel Benito de Peña y Herminia Rijos Laza, Defendants & Respondents.

SAN JUAN, P. R., *July 5th*, 1910.

The appeal taken by counsel Don Eduardo Cautiño in behalf of the plaintiff and appellant Emilia Rijos, to the Supreme Court of the United States, from the judgment rendered by this Court on the 21st of June, 1910, in the above entitled case, is hereby allowed; the amount of the bond to be filed by the appellant Rijos to answer for the costs, is fixed in the sum of two hundred dollars, and the term of sixty days is allowed for the preparation and translation of the record to be transmitted to the Supreme Court of the United States.

It was ordered and signed by the Hon. James H. MacLeary, acting as Chief Justice of the Supreme Court.

Attest.

A. F. CASTRO, *Sec'y.*

25 In the Supreme Court of Porto Rico.

No. 470.

EMILIA RIJOS CÓRDOVA, Plaintiff & Appellant,

vs.

TERESA, JOSÉ, MARIANA, ENCARNACIÓN and RAFAELA FOLGUERAS y Rijos, Manuel Benito de Peña and Herminia Rijos Laza, Defendants and Appellees.

Appeal Bond.

Know all men by these presents that we, Emilia Rijos Córdova, as principal, and Fidel Guillermety and Robert H. Todd, as sureties, are held and firmly bound unto the said Teresa, José, Mariana, Encarnación and Rafaela Folgueras y Rijos, Manuel Benito de Peña and Herminia Rijos Laza, the appellees above named, in the penal sum of Two Hundred Dollars ($200.) to be paid to the appellees aforesaid, their executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of August, A. D. 1910.

26 Whereas lately at a session of the Supreme Court of Porto Rico in a suit pending in said court as above entitled a final decree was rendered against the said appellant, Emilia Rijos Córdova, and said appellant having obtained the allowance of an appeal from said decree and a citation directed to the appellees above named, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Emilia Rijos Córdova shall prosecute said appeal to effect and answer all costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

EMILIA RIJOS CÓRDOVA. [SEAL.]
F. GUILLERMETY. [SEAL.]
R. H. TODD. [SEAL.]

In presence of:

CARLOS GONZALEZ.
FELIX DIEZ.

Fidel Guillermety and Robert H. Todd, being by me duly sworn, depose and say, each for himself, that he pays taxes to the People of Porto Rico upon real property in said Island valued at more than the penal sum of the foregoing bond, and that he is worth in visible property more than said sum over and above all legal set offs.

F. GUILLERMETY.
R. H. TODD.

Sworn to and subscribed before me by F. Guillermety and R. H. Todd, each of whom is of full age, married, property-owner, and resident of San Juan, and with each of whom I certify to be personally acquainted.

Witness my hand and official seal this 1st day of August, A. D. 1910.

27 No. 134.

F. RAMIREZ DE ARELLANO,
Notary Public.

Approved on this 2nd day of September, 1910.

[SEAL.] EMILIO DEL TORO,
Associate Justice, Sup. Court of Porto Rico.

28 UNITED STATES OF AMERICA, ss:

The President of the United States to Teresa, José, Mariana, Encarnación and Rafaela Folgueras y Rijos, Manuel Benito de Peñas and Herminia Rijos Lara, and to Bosch & Soto, their Counsel:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C., within sixty days from the date of this writ, pursuant to an appeal filed in the Office of the Secretary and Reporter of the Supreme Court of Porto Rico, in a certain cause lately pending in said court, wherein Emilia Rijos Córdova is plaintiff and appellant and you are defendants and respondents, to show cause, if any there be, why the judgment rendered therein against the said plaintiff and appellant should not be reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Emilio del Toro, Associate Jutsice of the Supreme Court of Porto Rico, at the city of San Juan, P. R., this 18th day of August, in the year of our Lord, one thousand nine hundred and ten.

[Seal Supreme Court of Porto Rico, United States of America.]

EMILIO DEL TORO,
Associate Justice of the Supreme Court of Porto Rico.

Attest:

A. F. CASTRO,
Secretary and Reporter of the Supreme Court of Porto Rico.

BOSCH & SOTO,
Attorneys of Manuel Benito de Peña.

29 Received this writ this 18th day of Aug., 1910, and served the same by delivery a true copy thereof to Bosch & Soto the attorneys of Record for Benito de Peña this at San Juan, P. R. This 19th day of Aug., 1910, Teresa, José, Mariana, Encarnación and Rafaela Folgueras y Rijos and Herminia Rijos Lara not being found. This at San Juan, P. R., this 31 day of Aug., 1910.

S. C. BOTHWELL, *Marshal.*

30 Supreme Court of Porto Rico, Island of Porto Rico.

I, Antonio F. Castro, Secretary and Reporter of the Supreme Court of Porto Rico, do hereby certify: that the foregoing is a true copy, faithfully translated into the English language, of all papers filed, and proceedings had and entered in a certain cause lately pending in said court, wherein Emilia Rijos Córdova, is plaintiff and appellant, and Teresa, José, Mariana, Encarnación and Rafaela Folgueras y Rijos, Manuel Benito de Peña and Herminia Rijos

Laza are defendants and respondents; that I have compared the same with their respective originals, and they are true and faithful transcripts therefrom, and of the whole thereof.

In witness whereof, I hereunto set my hand, and affix the seal of said court, and an internal revenue stamp, for one dollar, properly cancelled, at the city of San Juan, Porto Rico, this 2nd day of September, in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court of Porto Rico, United States of America.]

A. F. CASTRO,
Secretary and Reporter of the Supreme Court of Porto Rico.

[$1 revenue stamp, canceled.]

Endorsed on cover: File No. 22,327. Porto Rico Supreme Court. Term No. 141. Emilia Rijos Cordova, appellant, vs. Teresa Folgueras y Rijos et al. Filed September 30th, 1910. File No. 22,327.

(22,375)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 160.

DOMINGA ENRIQUETA DUMEY, APPELLANT,

vs.

ISABEL HERNANDEZ Y BELLO, NICOLAS MORELL Y HERNANDEZ, TOMAS MORELL Y HERNANDEZ, AND MARIA MORELL Y HERNANDEZ.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 25, 1912.

a In the District Court of the United States for Porto Rico.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

At a District Court of the United States for the District of Porto Rico, begun and held at the Court House, in the City of San Juan, on the second Monday of April, being the Eleventh day of the same month, in the year of our Lord One Thousand Nine Hundred and Ten, Present, Honorable John J. Jenkins, Judge of the District Court of the United States for the District of Porto Rico:

Among other were the following proceedings, to wit:

No. 646. Equity.

DOMINGA ENRIQUETA DUMEY
vs.
ISABEL HERNANDEZ Y BELLO et al.

1 In the District Court of the United States for Porto Rico.

646. Equity.

DOMINGA ENRIQUETA DUMEY
vs.
ISABEL HERNANDEZ Y BELLO et al.

Bill to Cancel Partition of Inheritance, etc.

Filed June 14, 1909.

To the Honorable Bernard S. Rodey, Judge of the District Court of the United States, in Chancery sitting, for the District of Porto Rico:

Dominga Enriqueta Dumey, complainant, brings this her bill of complaint against Ysabel Hernandez y Bello, widow of Damian Morell y Pons, deceased, and Nicolás Morell y Hernandez, Tomás Morell y Hernandez and Maria Morell y Hernandez, children of said Damian Morell y Pons and Ysabel Hernandez y Bello. And Thereupon your oratrix complains and says:

I.

That your oratrix is a citizen of Porto Rico, residing in the municipality of Lares, and that all the defendants are aliens and subjects of the King of Spain, the said defendants Ysabel Hernandez y Bello and Maria Morell y Hernandez being residents of the town of Soller, Island of Mallorca, the said defendant Tomás Morell y Hernandez being a resident of the City and State of New York, and the said defendant Nicolás Morell y Hernandez being a resident of the municipality of Lares aforesaid.

II.

That the said Damian Morell y Pons, who was born and died a loyal subject of the Spanish Crown and who was, as your oratrix hereinafter alleges and stands ready to prove, the father of your oratrix as well as of the three children above named as defendants, came to the then Province of Porto Rico to reside some time
2 previous to the Year of our Lord 1870 and took up his residence and entered into business in said municipality of Lares; that during or about the year 1872 said Damian Morell, being then unmarried, induced the mother of your oratrix, Catalina Dumey who was also unmarried, to enter into illicit relations with him and soon thereafter established her in a house in said town of Lares where they openly lived together and maintained carnal relations; and that, as a result of such relations a male child was born to them in the year 1873 or 1874 who died while yet very small, and thereafter in like manner your oratrix was born on the 4th day of August, 1875, in the house in which said Damian Morell and Catalina Dumey were living together as aforesaid and was the child of said Catalina Dumey by the said Damian Morell.

III.

That at the time of the birth of your oratrix the said Damian Morell recognized her as his child by making the ordinary and necessary provision for the care of her mother during and after childbirth, by paying all the expenses incurred at said birth, and thereafter by supporting and continuing to live with her said mother in the same relations as previously, and by admitting his paternity verbally and by daily acts inconsistent with any intention to deny the same; and that such course of action on the part of said Damian Morell continued for several years after the birth of your oratrix, he living with your oratrix' mother and treating your oratrix in all respects as a daughter and causing it to be so understood in the community, until shortly before the time of the events hereinafter described.

IV.

That from the said year 1872 until after the occur-ence of all the events hereinbefore set forth the said Damian Morell and the said Catalina Dumpey, mother of your oratrix, remained unmar-
3 ried and capable of contracting matrimony with each other; but that in the month of June, in the year 1880, the said Damian Morell, forgetful of his duty and obligation to your oratrix and her said mother, contracted matrimony with the defendant Ysabel Hernandez y Bello and thereafter had by her three children, Tomás, Nicolás, and Maria, who are the three other defendants above named; and that after his said marriage the relations theretofore existing between him and your oratrix' said mother ceased, but said Damian Morell nevertheless continued to contribute towards the support of your oratrix and her mother and to interest himself in your oratrix' welfare and never did any act to deny or nullify the effect of his previous recognition of your oratrix as his daughter; whereby

your oratrix acquired and became entitled to the status of natural recognized child of said Damian Morell, under and in accordance with the laws in force in that regard previous to the promulgation of the Civil Code.

V.

That after the birth of his said three children who are defendants herein, to wit: in the year 1889, said Damian Morell removed his place of residence from the island of Porto Rico to said Island of Mallorca, carrying with him his said legitimate family, the defendants herein, where they continued to reside up to the time of his death which occurred there on the 5th day of November, 1899, at which time his said three children hereinbe*be*fore named as defendants were all minors and had their legal place of residence with their said father; that thereafter only the defendant Nicolás Morell returned to Porto Rico to live, the other two children, Tomás and Maria, having continued to reside elsewhere.

VI.

That at the time of said departure of said Damian Morell for the Island of Mallorca to live in the year 1889 as aforesaid he was a member of a commercial firm doing business in said town of Lares under the firm name of Marques & Co.; that upon such de-
4 parture, being mindful to some extent of his duty toward your oratrix, he arranged with said firm to continue on his behalf the assistance and support which he had been furnishing to your oratrix and her mother and such assistance was so furnished by said firm from time to time until those in charge of said firm arbitrarily refused longer to furnish the same on account of their displeasure and disapproval of certain conduct of your oratrix; but your oratrix, upon information and belief, avers that such refusal never came to the knowledge of said Damian Morell up to the time of his death, and that he died in the belief that his orders touching the support and assistance of your oratrix and her mother were still being observed and obeye[4]

VII.

That after the death of said Damian Morell as aforesaid, to wit: on the 29th day of December, 1899, the defendants obtained, as your oratrix is informed and believes, from the Court of First Instance of Palma de Mallorca in said Island of Mallorca a declaration of heirship in their favor, based upon the allegation that said Damian Morell had died without leaving any last will and testament, declaring that said three children who are defendants were the only heirs at law of said Damian Morell, but that no proceedings for the declaration of heirship have ever been begun within the Island of Porto Rico; and that your oratrix had no knowledge until within a few months that said proceedings in said Island of Mallorca had taken place, the nature of the same being ex parte and not binding upon, or affecting the interest of, anyone "having a better right."

VIII.

That from the time of the death of said Damian Morell the interests of his estate in the Island of Porto Rico remained in charge of said commercial firm of Marquez & Co. until the return of defendant Nicolás Morell y Hernandez about the year 1901, since which time the latter has been in active management of said estate, but no step has ever been taken to administer the same judicially and no division of the same was made or attempted until the 8th day of April, 1908; that on the day last aforesaid a Notarial document called a "Particion de bienes hereditarios" (Partition of inherited property) was drawn up by the Notary of Lares, Mariano R. Acosta, and signed by the defendants herein or their representatives, the defendant Nicolas being the only party thereto present in person, defendant Ysabel Hernandez being represented by Juan Marquez y Marquez, defendant Maria Morell by Bartolomé Marquez y Colon, and said Tomás Marquez by his said brother Nicolás, wherein was recited the said death of Damian Morell, the proceedings for the declaration of heirship aforesaid, and the description of the different properties alleged to form the estate left by said Damian Morell at his death, and whereby the said widow, the defendant Ysabel Hernandez, in consideration of certain of the properties relinquished to her, ceded and renounced all her interest in or to any of the said properties described in said deed of partition, and the said defendant children proceeded to partition between them all the remaining property of the said estate; all of which will more fully appear from a certified copy of said deed of partition, which was drawn in the Spanish language, and a true and correct translation of the same into the English language, herewith filed as "Exhibit A" and prayed to be taken and considered as a part hereof to the same extent as if literally copied herein.

IX.

That the inventory constituting the description of the different properties enumerated in said deed of partition divided the same into ten groups, the first and third consisting of real and personal property in said Island of Mallorca and the remaining eight consisting of real and personal property in the Island of Porto Rico and within this judicial District of the agreed value of more than fifty thousand ($50,000) dollars, according to the assessment fixed in said deed of partition, the same consisting principally of plantations devoted to the cultivation of coffee, mortgages upon plantations of the same kind and the capital still retained in the said firm of Marquez & Company; but your oratrix alleges upon information and belief that the valuation given to many of said items of assets is ridiculously low and that other assets belonging to said estate at the time of the death of said Damian Morell have been since that time turned into cash and distributed among said defendants and are not mentioned in any way in said deed of partition, and that the real value of the estate left at his death by said Damian Morell far exceeded one hundred thousand dollars

and defendants should be required to render an accounting to your oratrix of all transactions affecting said estate during the time they have been in control and management of the same, including the rents and profits derived therefrom, so that the amount to which you- oratrix is entitled as an heir of her said father, Damian Morell, may be properly and legally ascertained and the same be set apart to her by a new partition and distribution of the property thereof, or be paid to her by the legitimate children who have already partitioned the same, as they may elect.

X.

That, by virtue of the facts and circumstances related in paragraphs two, three, four and six of this your oratrix' bill of complaint, your oratrix acquired and attained the status of a recognized natural child of said Damian Morell and continued to enjoy the same up to the time of his death; that the circumstances attending the birth of your oratrix and the recognition of her as his child by her said father as aforesaid was known to the defendants at and before the said time of his death; that such knowledge was one of the reasons inducing said defendants to obtain a declaration of heirship in the far away Island of Mallorca instead of in Porto Rico where by far the larger part of the property of said deceased was situate, to avoid any judicial administration of his said estate in the Island of Porto Rico and to delay for the term of more than eight years before taking any steps for the partition of said property.

7

XI.

That, by virtue of the premises, your oratrix is entitled under the laws of Porto Rico as existing at the time of the death of her said father to inherit as his recognized natural child and one of his heirs by force of law one half of the amount descending by the same law to each of his three legitimate children, the defendant herein, that is, to an undivided one-sixth interest therein; that the pretended deed of partition made by and between the said defendants on said 8th day of April, 1908, ignoring and omitting the known rights of your oratrix in the premises, is null and void as against your oratrix and should be so declared and ordered cancelled from the Registry of Property and that, pending this suit, a temporary injunction should be issued enjoining the three defendant heirs, Nicolás, Tomás and Maria from selling, mortgaging, pledging, or otherwise encumbering or disposing of any of the property in said deed of partition described or which belonged to said estate left by said Damian Morell; and that said defendant Nicolás Morell, who has been the heir in active charge and control of the assets of said estate since the death of his said father, as the representative of the other defendants, should be required to make and state to this court, or to such Master as may be by it appointed an account showing the total assets of said estate of said Damian Morell at the time of his death and of the disposition heretofore made of any part thereof as well as of the rents and profits derived therefrom from his said death until the execution of said deed of partition.

8 XII.

That said deed of partition hereinbefore mentioned has been duly recorded by said defendants in the proper Registry of Property as to the respective real estate of mortgages in the same described and belonging to the respective jurisdictions covered by each of said Registries; and that said deed of partition and its said recording constitute a cloud or burden upon the title of your oratrix to her said undivided one-sixth interest in the same which should be cancelled and removed by the decree of this honorable Court.

Forasmuch, therefore, as your oratrix is without remedy in the premises except in this court of equity, and to the end that the defendants may, if they can, show why your oratrix should not have the relief hereby prayed, and may to the best of their knowledge, information and belief full true and direct answer to this bill—but now under oath, the answer under oath being hereby expressly waived—; that your oratriz may be decreed by this court to be entitled, as the recognized natural child of said Damian Morell, deceased, to a one-sixth interest in the inheritance left by him, in accordance with the law in force at the time of his death; that the said deed of partition hereinbefore referred to, whereby the defendants attempted to distribute and settle said inheritance extrajudicially and ignoring the right of your oratriz to share therein, may be decreed to be null, void and of no effect as against the rights given by the law to your oratrix and the record of the same in the Registries of Property to be cancelled and stricken therefrom; that said defendants may be enjoined by the order and injunction of this court from selling, mortgaging, pledging, or otherwise encumbering or disposing of any of the property in said deed of partition described or which belonged to the estate left by said Damian Morell, deceased, during the pendency of this suit, and that the same may by its final decree be perpetuated so far as may be necessary for
9 the full protection of the rights of your oratrix; that the defendant Nicolás Morell may be required to make and state to this court an account showing the total assets of said estate at the time of the death of said Damian Morell and of the disposition heretofore made of any part thereof, as well as of the rents and profits derived therefrom from his said death until the execution of said deed of partition; that said defendants may be required to exercise their option whether to recognize the title of your oratrix to an undivided one-sixth interest in all the property left by said Damian Morell as aforesaid or to pay to her the value of said interest in money, and that, when such option is exercised, a decree may be entered as may be necessary to carry the same into effect; and that your oratrix may have such other and further relief as equity may require and to your Honor shall seem meet;

May it please your Honor to grant unto your oratrix a writ of subpœna in Chancery issued out of and under the seal of this honorable court, directed to the said defendants Ysabel Hernandez y Bello, Nicolás, Thomas and Maria Morell y Hernandez, commanding and enjoining them and each of them, on a day certain therein to be named and under a certain penalty therein to be expressed, to be

and appear before this honorable court and then and there full, true and direct answer make to this your oratrix' bill of complaint and to abide by such orders and decrees as this court may make in the premises.

And your oratrix will ever pray,

(Signed) R. H. TODD.
N. B. K. PETTINGILL,
Counsel for the Complainant.

ISLAND OF PORTO RICO,
City of Lares, ss:

Dominga Enriqueta Dumey, being by me first duly sworn, deposes and says, that she is the complainant described in the foregoing bill of complaint; that said document has been duly read to her, translated into the Spanish language, so that she knows the contents thereof; and that the allegations of fact therein contained are
10 true of her own knowledge or by information derived early in life from her mother, except those things alleged therein on information and belief, and those things she believes to be true.

(Signed) ENRIQUETA DUMEY.

Sworn to and subscribed before me, the undersigned authority, this 10 day of June, A. D. 1909.

No. 175.

[SEAL.] TOMAS BRYAN,
Municipal Judge.

11 In the District Court of the United States for Porto Rico.

Filed June 15, 1909.

In Equity. No. 646.

DOMINGA ENRIQUETA DUMEY
vs.
NICOLAS MORRELL Y HERMANDEZ et al.

Translation.

Number Thirty.

Partition of Inheritance.

In the town of Lares, Island of Porto Rico, United States of America, on the eighth day of the month of April, nineteen hundred and eight, before me, Don Mariano R. Acosta Y Lassalle, a lawyer and Notary of Porto Rico, with residence in the City of Aguadilla and in the presence of the proper number of witnesses, there appeared;

Don Juan Marquez y Marques, of full age, married, merchant and a resident of Lares, in the capacity of attorney in fact of Doña Isabel

Hermandez y Bello, Porto Rican, of full age, widow of Don Damian Morell y Pons, who was a resident of Lares, and to-day resides in Soller, Island of Mallorca, Spain.

Don Bartolome Marquez y Colon, of full age, married, a merchant and resident of Lares, in the capacity of attorney in fact of Doña Maria Morell y Hermandez, Porto Rican, of full age, unmarried, without profession and now residing in Soller Island of Mallorca, Spain, and

Don Nicolas Morell y Hermandez, Porto Rican, of full age, married and joined by his wife Doña Amparo Rodriquez, likewise of full age, property owner and resident of Lares, acting in his own right and in the capacity of attorney in fact of his brother of the full blood Don Tomás Morell y Hermandez, Porto Rican, of full age un-married, clerk and resident in the City of New York.

12 *Representation.*

They prove it as follows: Don Juan Marquez with the power of attorney number 89 dated July 6th, 1907, executed in Soller, before the Notary Don Jaime Domengi y Mir, whose signature is seen to be legalized by the American Consul- Agent in Palma de Mallorca.

Don Bartolomé Marquez, by power of attorney number 416 dated December 7th, 1907, executed in Soller before the Notary, Don Pedro Alcover y Maspons, whose signature is seen to be legalized by the American Consul- Agent in Palma de Mallorca, and

Don Nicolás Morell by the power of attorney number 23, dated May 31, 1907, executed in the City of Ponce of this Island, before the Notary Don Luis L. Jordan Dávila, which power is ratified and amplified by the power executed in New York on September 27th, 1907, before the Notary Public Don Luis Castro Lopez, whose signature the Clerk of New York certifies.

All said powers have clauses authorizing the execution of this instrument. I certify my personal acquaintances with and the additional individual details of the parties appearing, who assure me that they possess the full enjoyment of their civil rights and the free control of their property, said attorneys in fact stating that their powers had not been revoked, suspended or limited in any way, the wife of Don Nicolas Morell, appearing for the purpose of giving her express consent which, although unnecessary on account of dealing with separate property, is given out of an abundance of caution; and having, in my judgment, the necessary legal capacity for the execution hereof, they freely and spontaneously state:

First. That Don Damian Morell y Pons, who was a resident of Lares died in Soller, Island of Mallorca, Province of Baleares, Spain, on the 5th of November, 1899, without having made any last will and testament, being married to Doña Isabel Hermandez y Bello,
from which marriage they had three children, Don Nicolas,
13 Don Tomas, and Doña Maria Morell y Hermandez, who were
declared his heirs abintesto by judgment of the Court of First Instance of Palma de Mallorca, on December 29th, 1899, issued

by Judge Manuel Perez, Porto Rico, before his Clerk Don Juan Bestard v Gie.

Second. That all the parties interested in the inheritance being of full age, and there being no debts against the estate of the deceased, they have agreed to make the partition out of court in this form, and for that purpose they draw up the present inventory:

1. Five Government Bonds (Láminas amortizables) twenty five thousand pesatas. Forty eight shares of the Bank of Soller, nine thousand six hundred pesetas, Cash in said Bank, ten thousand pesetas.

2. Account against Doña Emilia Hermandez, seven thousand and thirty-nine pesetas. Account against Don Miguel Morell Busquets, ten thousand five hundred eighty-nine pesos, twenty-two cents, provincial currency. Account against Don Miguel Morell, Three thousand sixty-four pesos, Spanish money.

3. House number 6 Pastor Street, in the town of Soller.

4. Farm, tract situated in the barrio of Buenos Aires, municipality of Lares, composed of three cuerdas sixty-eight hundredths, equivalent to ane hectar-a, forty-four areas and sixty-four centi-areas in coffee and pasture, bounded on the North by lands of Jose Delgado, Lorenzo Garcia and Serapio Feo, and also by a house in which Don Damian Morell had a half interest, On the East, bv lands of Isabel Hermandez, the neighborhood road running through the middle, on the South by lands of said Mrs. Hermandez and on the West by the highway which leads to Adjuntas, and a half of a wooden house roofed with galvanized iron with its lot which fronts on the road which leads from Lares to Adjuntas, and has one story, twenty-two yards in front by ten yards deep and is bounded on the front, which is the West, by said road from Adjuntas. On the left, which is North, by lands of Lorenzo Garcia, on the right, which is South, by the tract of land here described and that of Jose Delago

14 Don Damian Morell y Pons acquired this property and the half interest in the house by purchase from Doña Maria Isidora Delgao y Estevas by deed number 171 executed in Utuado, on March 16th, 1897, before the Notary Don Osvaldo Alfonso y Fuertes, recorded as to the land, at page 153 of book 32 of the municipality of Lares, property number 1879, first inscription.

5. Farm, piece of coffee land, situated in the barrio of Buenos Aires and Latorre, municipality of Lares, composed of 69 cuerdas, 75/100, of land, equivalent to 27 hectareas, 41 areas and 64 centiareas, cultivated in coffee, plantain and bushes, with its dwelling house, cook house, machinery for hauling coffee, reservoir and drying platforms, which is bounded on the North with lands of Succession of Evangelista Cuevas, and those of Jose Monrroy, on the East, by those of Hilarmo Barbosa and those of Felix Beltran, by a brook called 'del memorillo"; on the South, by the lands of said Beltran and the road which leads from Lares to Adjuntas, and on the West, by the same road, and the lands of Jose Monrroy, recorded at page 117, of book 12 of the municipality of Lares, property number 741, inscription 2d.

6. Farm, tract situated in the barrio of Latorre, municipality of

Lares, composed of Ten cuerdas, equivalent to 3 hectareas, 93 areas and 4 centiareas, cultivated in coffee and pasture, which is bounded on the North and East by lands of the Succession of Ricardo Cueto, on the South, by the brook called "de los platanos," and on the West, by lands of Jose Monroy, recorded on page 22 turned, of book 2 of the municipality of Lares, property number 82, inscription 4. Don Damian Morell y Pons acquired these two farms in a settlement of a part of his partnership assets in the mercantile firm of Marquez and Company, of Lares, of which he was the managing partner, remaining as a special partner (comanditario), according to the amended agreement of partnership number 121, dated
15 May 16th, is bounded on the East with the property of Dionisio Roldan and that of the Succession of Eusebio Perez, on the North by lands of the same Succession of Perez and those of Baustista Suarez and Ramon Berganso; on the West, by lands of Ramon Molina and those of said Berganso; and on the South, by the brook "Mameyes Aragon," recorded on page 172 turned of book 71 of Utuado, property 877, inscription 18.

Farm, tract situated in the barrio of Juyuya Arriba, municipality of Utuado, cultivated in coffee, plantain, pasture, bushes and trees, as well as houses, composed of 27 cuerdas, equivalent to 10 hectareas, 69 areas, and 21 centiareas, bounded with similar properties on the East by Juan Maria Rivera, on the West by José Roman, on the South, by Vidal Rivera, and on the North by the property last described, recorded on page 163 turned, of book 58 of Utuaro, property number 1023, inscription 13.

City property, house of wood covered with zinc, having no number, in the town of Adjuntas, which fronts on the plaza forming one corner of Comercio street; also steam machinery for hulling coffee together with the storehouse of wood covered with zinc in which it is located, and the water rights for said machinery, the whole being situated on a lot which fronts on said plaza of Adjuntas at the West end, and measures 20 meters, 62 Millimeters in front, on the right side entering, that is on the North 28 meters 3 millimeters bounding on Comercio street with which it makes a corner; on the left, that is the South, 28 meters 3 centimeters bounded by Jaime Miro and on the back that is, the East, bounded by Francisco Moll; it measures 17 meters, 545 millimeters which measurements form a superficial area of 504 square meters, 540 square millimeters, recorded on page 211, of book 58 of Adjuntas, property number 1091, inscription 12.

Farm, tract situated in the barrio of Tamana, municipality
16 of 1889, executed in Lares, before the Notary Victor Martinez.

7. Farm, tract situated in the barrio of Latorre, municipality of Lares, composed of 15 cuerdas of land more or less, equivalent to 4 hectareas, 89 areas, and is bounded on the East by lands of Esteban Paralitici and Jose Colon, on the West, by those of Damian Morell, on the North, by the neighborhood road which leads to the town of Lares; and on the South, by the brook "de los platanos," cultivated in coffee, plantains, pasture and bushes, recorded on page 146, of the book 18 of the municipality of Lares, property

number 1140, inscrittion 3. Don Damian Morell y Pons acquired this property by purchase from Francisco Segarra y Santiago by deed number 165 dated March 4th, 1896, executed in Lares before the Notary Victor Primo Martinez y Gonzalez.

8. Capital as special partner in the mercantile firm Marquez & Co., of Lares, invested by Don Damian Morell y Pons, by deed number 121 executed in Lares on May 16th, 1889, before the Notary Victor Martinez, extended by deed of March 25th, 1895, in said town of Lares before the same Notary Martinez, and modified by deed Number 83 of April 7th, 1903, executed in Lares before the Notary Salvador Picornell y Cardona, the capital of the special partner, that is the Succession of Don Damian Morell y Pons, being $9,336.17, recorded in the mercantile Registry on page 83 of book 22 of Partnerships, certificate number 1101, inscription 1st, which special capital amounts at present to $9,548.57.

9. A mortgage credit against Sobrinos de Castañer, an agriculture partnership, domiciled in the barrio of Portillo, municipality of Adjuntas, and which is a lien upon the following properties:

Farm, tract composed of 46 cuerdas more or less, equivalent to 18 hectareas, 7 areas, and 98 centiareas, in the barrio of Jayuya Arriba, place called Tallaboa, municipality of Utuado, containing houses, coffee trees, plaintains, pasture, bushes and trees, which Adjuntas, composed of 115 cuerdas, equivalent to— hectareas, 20
17 areas and 36 centiareas, cultivated in coffee, plantains, pasture, hills and bushes, containing a dwelling house; it is bounded on the East by lands of Jose Miro and Nicomedes del Rio; on the North by those of Jaime Sureda; on the West by those of Fidel Bermudez and those of Alfonso Castañer, and on the South by the river "Tamaña," recorded on page 227 turned, of book 53 of Adjuntas, property number 2460, inscription 4.

Farm, coffee plantation called Santa Ana, in the barrio of Portillo and Tanamá of Adjuntas, composed of 278 cuerdas of land more or less, equivalent to 119 hectareas, 26 areas, 52 centiareas, cultivated in coffee, plantians, and bananas, containing a dwelling house of wood with roof of zinc, a storehouse of wood and roof of zinc and another house of wood and roof of zinc which contains the machinery for hulling and polishing coffee, run by water power, bounding on the East by lands of Alfonso Castañer, on the West by those of Santa Irrizarri, those of José Morales, and those of said Castañer, on the North by lands of José Cortes, those of Juan Bautista Terry and those of Doña Trada Rodriquez, and an the South by those of Emilio Perez and those of Juan Plasa, recorded on page 156 turned of book 52 of Adjuntas, property number 2402, inscription 3.

Said properties are responsible in the following manner: the first for $600 of capital, $200 of interest and $100 for costs. The second for $400 capital, $150 of interest and $100 of costs.

The third for $1,500 of capital, $400 of interest and $400 of costs. The fourth, for $1,200 of capital, $450 of interest and $200 of costs: and the fifth for $1,277.44 of capital, $300 of interest, and $200 of costs.

This credit was evidenced by deed number 28 of September 12th,

1904, in Ponce before the Notary Gustavo Rodriquez, by Sobrinos de Castañer in favor of M. Morell & Co., for the amount of
18 $5,977.44 payable in six years and in six installments, that is in the proportion $996.24 on the 31st of March of the years 1906 to 1911 both inclusive, the debtor being obliged to pay as interest upon said sum stipulated at 12% annually the sum of $2,510.52 in the proportion and installments following: $77.29 on April 1st, 1905, $597.74 on the same day and month of 1906, $478.20 on the same day and month of 1907, $358.64 on the same day and month of 1908, $239.10 on the same day and month of 1909, and $119.55 on said 1st day of April 1910; which mortgage credit amounting, including principal and interest, to $8,487.96 was assigned by M. Morell & Co. to the minor children Don Nicolas, Don Tomas and Doña Maria Morell y Hermandez by deed number 29 in Ponce on the same date and before the same official as the deed by which it was evidenced and in that form it is found inscribed in the Registry of Property, but as the price of its purchase came from the assests left by Don Damian Morell y Pons it is states in this connection in order to be partitioned together with his other property. This credit according to the account submitted on February 15th, 1908, amounts to $6,804.94.

10. A mortgage credit against Don Antonio Collazo y Ortiz which is a lien upon the following properties:

Farm, tract situated in the Barrio de Latorre, municipality of Lares, composed of 96 cuerdas, 75/100 more or less, equivalent to 38 hectareas, 2 areas and 65 centiareas, cultivated in coffee, pasture and bushes, containing a dwelling house of one story, made of wood and roofed of galvanized iron, another of the same materials containing the machinery for hulling coffee, a small cane mill in bad condition, and a platform for drying coffee and it is bounded on the North by lands of Antonio Collazo y Ortiz formally belonging to Maria de la Paz Velez, on the East by those of Maria Isidra Velez, on the South by the river Blanco and lands of Pedro Rega-
19 lado Gonzalez formerly belonging to Isidoro Velez y Velez and on the West by lands of Silverio Vera. Recorded on page 90 of book 20 of Lares, property number 196 inscription 7.

This credit was evidenced by deed number 100 dated July 9. I mean February 1895, in Lares before the Notary Victor Martinez, by Antonio Collazo y Ortiz in favor of Don Damian Morell y Pons for the amount of $12,000 pesos of the money then in currency with interest at 9% per annum, payable in the following form: in the month of February of the years 1896 to 1899 inclusive he will pay the interest at the end of each year; in the same month of 1900 he will pay $6,000 pesos of the deb. with the interest accrued for the amount remaining unpaid, and an equal amount in the same month of 1901 with the interest corresponding to the amount remaining unpaid. This credit, according to the accounts submitted in February 1908, amounts to $6,789.62.

Third. Doña Isabel Hermandez y Bello renounces in favor of her children the ganancial rights which might belong to her in assets inventoried, agreeing to what shall be adjudicated to her hereinafter, and by virtue of this renunciation and inasmuch as the division

which is being made is only of the property belonging to Don Damian Morell, her three children here appearing or represented renounce on their part in favor of their mother Doña Isabel the gananciał rights which might belong to them in the property acquired by the latter, wherefore and by virtue of this clause all the property acquired by Doña Isabel Hermandez, even by purchase and during her marriage shall be considered as her exclusive property and for that reason expressly they are omitted from this instrument.

Fourth. Therefore, by common consent the distribution of the inheritance is made in the following form:

To the widow Doña Isabel Hermandez Bello is adjudicated: The full dominion of the rustic*t* tract of the three cuerdas sixty-
20 eight hundredths in the barrio of Buenos Aries of Lares, described under number 4 and which is valued at $114.60; the full dominion of the half of the house and lot also described under number 4 of the inventory, which is valued at $185.40; the usufruct of the house in Pastor street number 6, in the town of Soller, under number 3 of the inventory, during her life and while preserving her condition of widowhood. The naked title of this house is adjudicated two thirds part to Doña Maria and one third part to Don Tomas Morell.

To Don Nicolas Morell y Hermandez is adjudicated: The farm in the barrios of Buenos Aries and Latorre of Lares containing 69 cuerdas 75/100 with buildings described under number 5 of the inventory, valued at $2,058; the rustic tract in the barrio of Latorre of Lares containing 10 cuerdas described under number 6 of the inventory, valued at $440; the rustic tract in the barrio of Latorre of Lares, containing 15 cuerdas, described under number 7 of the inventory, valued at $660; in cash received before the execution of this instrument, $13,195.51. Total $16,353.51.

To Don Tomas Morell y Hermandez is adjudicated: The capital of the special partnership in the mercantile house of Marquez & Co. of Lares, under number 8 of the inventory, amounting to $9,548.57; the mortgage credit against Sobrinos de Castañer and which is a lien upon the five properties described under number 9 of the inventory, amounting according to the liquidation of February 15th, 1908, to $6,804.94. Total $16,353.51. There is adjudicated to him in addition an undivided coownership of a one third part in the naked title of the house number 6 Pastor street in the town of Soller.

To Doña Maria Morell y Hermandez is adjudicated: The five government bonds, the forty-eight shares in the Bank of Soller, and the cash in said Bank, referred to under number 1 of the inventory, valued at $6,670; the mortgage credit against Don Antonio Collazo y Ortiz and which is a lien upon the property described under
21 number 10 of the inventory, amounting, according to the accounts submitted in February 1908, to $6,789.62; in cash received before the execution of this instrument $2,893.89. Total $16,353.51. There is adjudicated to her in addition an undivided co-ownership of two thirds part in the naked title of the house number 6 Pastor street in the town of Soller of which the usufruct belongs to Doña Isabel Hermandez.

Observations.

The credit against Don Emilio Hermandez and the two credits against Don Miguel Morell referred to under number 11 of the inventory, remain undivided, but as fast as their proceeds are liquidated the same will be divided in equal parts, among the three heirs.

The cash to the amount of $16,089.40 which has been divided between Don Nicolas and Doña Maria Morell is the proceeds of the profits or surplus of the inheritance accumulated since the death of the ancesstor and which was omitted from the inventory.

Anyone of the co-owners of the house in Pastor street, in the town of Soller, are hereby authorized to describe and appraise said property by means of a Notarial act in accordance with the laws in force in Spain in order to obtain its inscription in that Registry of Property according to the division and form which is shown in this document, causing it to appear that to Doña Maria Morell has been assigned the two thirds part on account of her brother Don Nicolas having previously renounced in her favor the third part which would have belonged to him.

The brothers and sister Morell having already arrived at full age, approve all the acts of control and administration done by their mother during their minority.

22 The properties divided are free of every kind of liens and encumbrances and their taxes paid and the heirs are already in the p ssession and enjoyment of what has been adjudicated to them.

If other property should appear it will be distributed in equal parts among the three heirs.

Warnings.

I the Notary make the following: That taxes constitute a preferred lien; that the admition of the receipt of an amount of money is final although afterwards it may prove to be incorrect in whole or in part; that this deed ought to be inscribed in the Registry of Property for the purposes of the Mortgage Law.

It was so stated and executed, Don Gabriel Pons and Don Francisco Bujosa, resident of Lares, being witnesses. And they being informed of the right which the law gives them to read this document for themselves, I proceed with their consent to read it in its entirety, the contents of which they ratified and signed together with the witnesses. Of all of which and of the acquaintance with said witnesses, who assured me that there was no legal obstacle for their being such, I the Notary certify: Signed, Juan Marquez, Bme. Marquez, with the following signatures: Nicolas Morell, Amparo Rodriquez, Gabriel Pons, Franco. Bujosa. Signed and rubris: Mariano R. Acosta. There is an Internal Revenue Stamp of the value of one dollar cancelled by that of the Notary's office.

The foregoing is a copy true to its original of which I certify and at the petition of Robert H. Todd, Esq., I issue it consisting of this

sheet and eight others of the same kind attaching hereto the corresponding Revenue stamp, in Aguadilla on the 1st of June, 1909.
(Signed.) MARIANO R. ACOSTA.

(A fifty cents Revenue stamp cancelled by the seal of the Notary.)

23 In the United States District Court for Porto Rico.

Equity. No. 646.

DOMINGA ENRIQUETA DUMEY, Complainant,
vs.
ISABEL HERNANDEZ Y BELLO et al.

Demurrer and Plea Thereto.

Filed March 21, 1910.

To the Honorable B. S. Rodey, Judge of the United States District Court for Porto Rico:

The demurrer and plea of the above named defendants to the bill of complaint of the above named plaintiff:

First. The said defendants, by protestation not confessing or acknowledging all or any of the matters in the said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, jointly demur to the said bill, and for causes of demurrer show:

I.

That the said plaintiff has not, as appears by his said bill, made out any title to the relief thereby prayed.

II.

That it appears by the said bill that the said plaintiff has an adequate remedy at law.

III.

That it appears by the said bill that there are divers other persons who are necessary parties to the said bill who are not made parties thereto.

IV.

That it appears by the said bill that the plaintiff herein, the said Enriqueta Dumey, was born on the 4th day of August, 1875, having reached her majority in the year 1898; and having elapsed more than two years since the said plaintiff became of age, the action herein is barred according to the terms of the Civil Code of
24 Porto Rico, sec. 199.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, said defendants pray the judgment of this honorable Court whether they shall be compelled to make any answer to said bill.

Second. And the said defendants, not waiving their said several demurrers, but wholly relying thereon, do plead thereto and for plea say:

That some of the defendants, Maria Morell Hernandez, Tomas Morell Hernandez and Nicolas Morell Hernandez, are not and never have been aliens as alleged in said bill as they are and always have been natives and citizens of Porto Rico.

All of which matters and things these defendants aver to be true, and do plead the same in bar to the whole of the said bill, and these defendants humbly pray the judgment of this Court, whether they ought to be compelled to make any answer to the said bill; and they humbly pray to be hence dismissed with their reasonable costs in their behalf sustained.

(Signed) LOPEZ, TORD & CANALES,
Attorneys for Defendants.

We hereby certify that the foregoing demurrer and plea are in our opinion well founded in point of law.

(Signed) LOPEZ, TORD & CANALES,
Attorneys for Defendants.

ISLAND OF PORTO RICO,
City of Ponce:

Nicolas Morell Hernandez, being first duly sworn, deposes and says: I am one of the defendants in the above entitled action. The foregoing plea is true in point of fact and neither the plea nor the foregoing demurrer are interposed for delay.

(Signed) NICOLAS MORELL HERNANDEZ.

25 No. 161.

Subscribed and sworn to before me by Nicolas Morell y Hernandez, married, of age, and a resident of Lares, Porto Rico, and to me personally known.

Ponce, March 19th, 1910.

(Signed) N. R. CANALES, [SEAL.]
Notary Public.

26 In the District Court of the United States for Porto Rico.

Equity. No. 646.

DOMINGA ENRIQUETA DUMEY
vs.
ISABEL HERNANDEZ Y BELLO et al.

Journal Entry of July 7, 1910.

This matter is before the court for hearing on the demurrer to the complaint; Nemesio Canales appearing in support of the demurrer and Messrs. Pettingill and Todd against the same. And it

appearing that a plea has also been filed in the cause, counsel for the complainants contend that the demurrer is thereby waived. And the court having heard the arguments of counsel in that regard, sustains the contention of counsel for the complainants and rules that the filing of the plea does in fact waive the demurrer. Thereupon counsel for the respondents request leave to withdraw the plea, and counsel for complainants not objecting, he is permitted to withdraw the same. The hearing on the demurrer is thereupon proceeded with and at the conclusion of the arguments the matter is taken under advisement with leave to counsel to file briefs in the premises. The respondents to have fifteen days time and the complainants five days thereafter in which to file their briefs, each side to submit copies of same to the opposite party.

27 In the District Court of the United States for Porto Rico.

No. 646. Equity.

DOMINGA ENRIQUETA DUMEY
vs.
ISABEL HERNANDEZ Y BELLO et al.

Opinion of Court.

Filed July 23, 1910.

The Supreme Court of Porto Rico has decided that the right of the plaintiff to maintain this action has been barred by the prescription fixed by the code. It will make no difference whether the object of the action be for the acknowledgment of a natural child or an action to claim filiation or the interest of the complainant in the property of her deceased father. No chance is left for argument. Every argument that can be made for the complainant in this case was ruled against her by the Supreme Court of Porto Rico. By the law of Porto Rico the right of the complainant is barred by the statute. The interpretation given to the law of limitation by the Supreme Court of Spain cannot control as the law of Congress requires this court to adopt as its rule of decision, the laws of the Island of Porto — except when the constitution, treaties, or statutes of the United States otherwise require or provide. The laws of Porto Rico are the laws as construed and applied by the courts of Porto Rico. There is no principle of the federal constitution or of any federal law or of general commercial law involved in this case. Therefore this court is bound to follow the latest decisions of the Supreme Court of Porto Rico. Justo Amsterdam et al. v. Felix Puente y Solana, Opinion by Mr. Justice Wolff, June 17, 1910. Rijos Cordova v. Rijos, Opinion by Mr. Justice Toro, June 21, 1910.

The Clerk will please notify the attorneys for the respective parties as early as convenient so that an appropriate order covering the views herein expressed may be drawn.

July 23, 1910.

(Signed) JOHN J. JENKINS, *Judge.*

3—160

28 In the District Court of the United States for Porto Rico.

Equity. No. 646.

DOMINGA ENRIQUETA DUMEY
vs.
ISABEL HERNANDEZ Y BELLO et al.

Order Dismissing Suit.

Filed July 28, 1910.

This cause came on to be heard upon respondent's demurrer to the bill on file herein, and the court, after hearing the argument and brief of respective counsel, and being sufficiently advised in the premises, sustains that part of said demurrer wherein the statute of limitations as construed by the Supreme Court of Porto Rico is set up as a bar to the present action, and consequently doth now

Order, adjudge, and decree, that this suit be, and the same is hereby dismissed and it is further ordered, adjudged and decreed that the said respondents have and recover from the said complainants their costs, incurred in this suit and amounting to — dollars.

(Signed) JOHN J. JENKINS, *Judge.*

July 28, 1910.

29 In the District Court of the United States for Porto Rico.

Equity. No. 646.

DOMINGA ENRIQUETA DUMEY
vs.
ISABEL HERNANDEZ Y BELLO et al.

Petition for Appeal.

Filed September 24, 1910.

The complainant in the above entitled cause, Dominga Enriqueta Dumey, conceiving herself aggrieved by the order and decree made and entered by this court in the above entitled cause under date of the 28th day of July, A. D. 1910, wherein and whereby, among other things, it was and is ordered and directed that the bill of complaint be finally dismissed, do hereby appeal from said final order and decree to the Supreme Court of the United States for the reasons to be set forth in an assignment of errors to be filed herein; and she prays that this her petition for her said appeal may be allowed, and that a transcript of the record, proceedings and findings upon

which said final decree was based, duly authenticated, may be sent to said Supreme Court of the United States.

Dated at San Juan, Porto Rico, this 3rd day of September, 1910.

(Signed) N. B. K. PETTINGILL,
R. H. TODD,
Solicitors for Complainant.

30 In the District Court of the United States for Porto Rico.

Equity. No. 646.

DOMINGA ENRIQUETA DUMEY
vs.
ISABEL HERNANDEZ Y BELLO et al.

Appeal Bond.

Filed Sept. 24, 1910.

Know all men by these presents that we, Robert H. Todd, as attorney for the complainant in the above suit, as principal, and Salvador Suan and Pedro de Elzaburn, as sureties, are held and firmly bound unto Isabel Hernandez y Bello, Nicolas Morell y Hernandez, Tomas Morell y Hernandez y Maria Morell y Hernandez, defendants in said suit, in the full and just sum of Two Hundred and Fifty Dollars ($250), for the payment whereof well and truly to be made, we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of September, A. D., 1910.

Whereas lately at a session of said District Court of the United States for Porto Rico in the above entitled and numbered suit, the said complainant having obtained from said court an order allowing an appeal to the Supreme Court of the United States to reverse the final decree therein whereby the bill of complaint was dismissed, which appeal has been allowed and entered in open court, during a stated Term of the same;

Now the condition of the above obligation is such that, if the said complainant in the above entitled and numbered suit shall prosecute their said appeal to effect, and shall answer for all costs that may be awarded against her, if she fails to make her plea
31 good, then the above obligation is to be void, otherwise to remain in full force and virtue.

(Signed) R. H. TODD. [SEAL.]
SALVADOR SUAN. [SEAL.]
PEDRO DE ESZABURN. [SEAL.]

UNITED STATES OF AMERICA,
District of Porto Rico:

Salvador Suan and Pedro de Elzaburn, being first duly sworn, each for himself deposes and says that he is one of the parties who

signed as a surety to the above bond, and that he is worth in visible property within the District subject to levy under execution, more than the said penal sum of Two Hundred and Fifty Dollars.

(Signed) SALVADOR SUAN.
[SEAL.] PEDRO DE ELZABURN.

Sworn to and subscribed before me this 24th day of September, 1910.

(Signed) JOHN L. GAY, *Clerk.*

Taken and approved by me, at San Juan, Porto Rico, this 24th day of September, 1910.

(Signed) JOHN J. JENKINS, *Judge.*

32 In the District Court of the United States for Porto Rico.

Equity. No. 646.

DOMINGA ENRIQUETA DUMEY
vs.
ISABEL HERNANDEZ Y BELLO et al.

Assignment of Errors.

Filed Sept. 24, 1910.

Comes now the complainant in the above entitled and numbered suit, now appellant, by her counsel, N. B. K. Pettingill and R. H. Todd, and assigns the following as error committed by the court below during the progress of said cause:

I.

The court erred in dismissing complainant's bill of complaint.

Wherefore appellant prays the Honorable, the Supreme Court of the United States, to examine and correct the error assigned, and for the reversal of said final decree herein.

(Signed) N. B. K. PETTINGILL,
R. H. TODD,
Counsel for Appellant.

33 In the District Court of the United States for Porto Rico.

Equity. No. 646.

DOMINGA ENRIQUETA DUMEY
vs.
ISABEL HERNANDEZ Y BELLO et al.

Order Allowing Appeal, etc.

The plaintiff, Dominga Enriqueta Dumey, by her counsel having on the 24th day of September, 1910, filed her petition of appeal in

this cause, it is now hereby ordered that an appeal to the Supreme Court of the United States from the order made and entered herein on July 28th, 1910, be, and the same hereby is, allowed to said plaintiff; and that a certified transcript of the record and all proceedings herein upon which said order was made be transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of Two Hundred and Fifty Dollars ($250.00), conditioned for the payment of costs as provided by law; and a bond in the above amount having been duly executed in this cause, and, being now presented, is duly examined and approved.

Dated at San Juan, Porto Rico, this 24th day of September, 1910.

(Signed) JOHN J. JENKINS, *Judge.*

34 In the District Court of the United States for Porto Rico.

No. 646.

DOMINGA ENRIQUETA DUMEY
vs.
ISABEL HERNANDEZ Y BELLO et al.

Præcipe for Transcript.

In making up the Transcript of the record for the Supreme Court of the United States upon the appeal taken herein by the complainant, the Clerk of the court aforesaid will please include in said Transcript the following papers and proceedings and no others, to wit:

1. The bill of complaint, with the English translation of the Exhibit thereto, filed June 14th, 1909.
2. The demurrer and plea filed to said bill by the defendants on March 21st, 1910.
3. The journal entry made in said cause on July 7, 1910.
4. The opinion of the court sustaining defendant's demurrer, filed July 23, 1910.
5. The decree dismissing the bill of complaint, entered July 28, 1910.
6. Complain-t's petition of appeal, appeal bond, and assignment of errors, filed on September 24, 1910.
7. The order of the court granting the appeal.

(Signed) N. B. K. PETTINGILL,
R. H. TODD,
Counsel for Complainant and Appellant.

8. Citation, filed September 29, 1910.
9. Præcipe for record, filed Sept. 24, 1910.

35 In the District Court of the United States for Porto Rico.

646. Equity.

DOMINGA ENRIQUETA DUMEY
vs.
YSABEL HERNANDEZ Y BELLO et al.

I, John L. Gay, Clerk of the District Court of the United States, in and for the District of Porto Rico, do hereby certify the foregoing thirty-three typewritten pages, numbered from 1 to 33 inclusive, to be a true and correct copy of that part of the record and proceedings in the above entitled cause, as called for by the præcipe of the appellant, and as same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 18th day of October, A. D., 1910, at San Juan, Porto Rico.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk District Court of the United States for Porto Rico.

35½ [Endorsed:] No. 646. Equity. In the District Court of the United States for Porto Rico. Dominga Enriqueta Dumey vs. Isabel Hernandez y Bello, et al. Record on Appeal.

36 In the District Court of the United States for Porto Rico.

Equity. No. 646.

DOMINGA ENRIQUETA DUMEY
vs.
ISABEL HERNANDEZ Y BELLO et al.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Isabel Hernandez y Bello, Nicolas Morell y Hernandez, Tomas Morell y Hernandez and Maria Morell y Hernandez, and Tord, Toro & Canales, their Counsel of Record, Greeting:

You, and each of you, are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal duly allowed and entered in the Clerk's office of the District of the United States for Porto Rico, in a suit wherein Dominga Enriqueta Dumey is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said complainant and appellant, as in the said order allowing an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John J. Jenkins, Judge of the District Court of the United States for Porto Rico, and the seal of said court, this 24th day of September, A. D. 1910.

JOHN J. JACKSON, *Judge.*

[Seal United States District Court for the District of Porto Rico.]

Attest:
JOHN L. GAY, *Clerk.*

Service of the above citation and receipt of a copy thereof admitted this — day of September, 1910.

LOPEZ, TORD & CANALES,
Counsel for Isabel Hernandez y Bello et al., Appellees.

37 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Writ on the therein named Isabel Hernandez y Bello et al. by sending through the Registered Mail, as per Attorney's instructions, a true and correct copy thereof to Lopez, Toro & Canales, as Counsel of Record of the said Isabel Hernandez y Bello et al. at Ponce P. R. in the said District on the 27th day of September 1910.

H. S. HUBBARD,
U. S. Marshal.
JOHN L. HAAS,
Chief Deputy.

38 [Endorsed:] No. 646. Equity. In the District Court of the United States for Porto Rico. Dominga Enriqueta Dumey, vs. Isabel Hermandez y Bello, et al. Citation. Filed. Clerk's Office United States District Court. Sept. 29, 1910. John L. Gay, Clerk of the Court. By N. V. Colburn, Deputy. Marshal's fees: Service, $2.00. C. Expenses, —.

Endorsed on cover: File No. 22,375. Porto Rico D. C. U. S. Term No. 160. Dominga Enriqueta Dumey, appellant, vs. Isabel Hernandez y Bello, Nicolas Morell y Hernandez, Tomas Morell y Hernandez and Maria Morell y Hernandez. Filed November 1st, 1910. File No. 22,375.

18

Office Supreme Court, U. S.
FILED.
JAN 17 1913
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 141.

EMILIA RIJOS CORDOVA, APPELLANT,

vs.

TERESA FOLGUERAS Y RIJOS ET AL.

No. 160.

DOMINGA ENRIQUETA DUMEY, APPELLANT,

vs.

ISABEL HERNANDEZ Y BELLO ET AL.

BRIEF FOR APPELLANTS.

N. B. K. PETTINGILL,
Counsel for Appellants.

(22,327 and 22,375)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 141.

EMILIA RIJOS CORDOVA, APPELLANT,

vs.

TERESA FOLGUERAS Y RIJOS ET AL.

AND

No. 160.

DOMINGA ENRIQUETA DUMEY, APPELLANT,

vs.

ISABEL HERNANDEZ Y BELLO ET AL.

BRIEF FOR APPELLANTS.

Statement of the Cases.

Both these cases come on appeal from the courts of Porto Rico, the first from its Supreme Court and the second from the District Court of the United States for that district. Both were decided below upon demurrers to the respective com-

plaints, and the decision in each was based upon the proposition that appellant's statement of her cause of action showed upon its face that it was barred by the statute of limitations—that is, by prescription, as it is ordinarily called in the Spanish law. In No. 160, as shown by his opinion (Record, p. 17), the Federal judge based his decree upon decisions of the Supreme Court of Porto Rico, citing among others the decision of the latter court in No. 141 itself.

The cause of action as stated by each complainant was founded upon a claim of right to inherit an aliquot part of the estate left at his death by the person alleged to be her father, the basic allegations in each case being that, admitting her parents were not legally married, they were at the time of her conception and her birth *capable* of contracting legal marriage with each other; that after birth she was duly recognized as his child by the father, both by words and by acts, continuously and consistently for a sufficient time to have obtained a *status* as such recognized child, and that under the law as existing at the death of the father she was because of such *status* entitled to inherit as an heir a specified portion of his estate. Each complaint contained a prayer, among others, that complainant therein be decreed entitled as such heir to the aliquot part of said estate claimed, and that the same be liquidated in amount or set-off in kind.

As already stated, the demurrer in each case raised the question of the prescription of the cause of action as alleged, and each was sustained against the complainant, now appellant, on that ground and judgments of dismissal entered without leave to amend (No. 141, pp. 6, 11; No. 160, p. 18).

As different laws or statutes governing this question were in force in Porto Rico at different periods, it is necessary for a proper application of the law to the facts (allegations being regarded as facts upon demurrer for present purposes) that the dates of the birth of each complainant and of the death of her father be borne in mind. Those dates are as follows:

In *No. 141,* appellant was born between 1863 and 1869, the exact date not being alleged and not being important, as there was no change in the law during that time, and her father died in the latter year, 1869.

In *No. 160,* appellant was born in 1875 and her father died in 1899, in Mallorca, Spain, to which place he had removed from Porto Rico in the year 1889. In December, 1899, the three legitimate children obtained from the court in Mallorca a "declaration of heirship" in their favor, ignoring the existence of appellant (pp. 2, 3).

No formal assignment of errors was filed in No. 141, and only a single error was assigned in No. 160 (p. 20) at the time of taking the appeals; so, as the Federal court in the latter case gave no reason for its action other than the precedent of the former—which it followed—and as the one presents no essentially different questions from the other as to the points here involved, the following assignment, equally applicable to both, may be here stated pursuant to Rule 21 of this court.

Assignment of Errors.

1. The court below erred in holding that appellant's cause of action was barred either by article 137 of the Civil Code of 1889 or by section 199 of the Revised Civil Code of 1902.

2. The court below erred in holding that, in order to state a sufficient cause of action of the nature of that stated in the bill of complaint or complaint in these cases, some solemn authentic act of recognition on the part of the father, or some record thereof, or a declaration to that effect by a competent court must be alleged.

3. The court below erred in sustaining defendants' demurrer and entering judgment for defendants thereon.

ARGUMENT.

The jurisdiction of the respective courts below was not questioned. The jurisdiction of this court depends upon the amount involved being over five thousand dollars (Royal Ins. Co. *vs.* Martin, 192 U. S., 149, 159).

That the amount involved in *No. 160* was at least ten thousand dollars is directly shown by the allegations of paragraph IX of the bill of complaint (p. 4), appellant claiming a one-sixth part of the value there alleged (p. 6).

There is no allegation of the value of the inheritance claimed in *No. 141*, but reference is made in paragraph 5 of the complaint (p. 2) to the specific properties included therein, of which appellant claims a one-fifth share (p. 4). This has been supplemented by the filing in this court of an affidavit on her behalf, accompanied by a certificate of the assessed value of those properties as fixed by the government of Porto Rico for the purposes of taxation. Notice of the presentation of these documents, with copies of the same, has been served upon counsel for appellees in that case. No question of jurisdictional amount has been raised by motion to dismiss, and we think it clear from said affidavit and certificate that much more than the minimum jurisdictional amount is shown to be involved.

We therefore proceed to the discussion of the question of prescription, the ground upon which both cases were decided below, taking as a basis for such discussion the reasons stated by the Supreme Court of Porto Rico in *No. 141*, as those reasons were followed by the Federal court in the decision of *No. 160*, leaving for subsequent consideration the question of the sufficiency of the cause of action stated, as that ground was referred to only by the Supreme Court of Porto Rico in *No. 141*.

I.

Statutes Held to Have Barred These Actions Not Applicable.

It will hardly be controverted that the laws successively in force in Porto Rico regulating the rights of recognized natural children may be divided into three periods: First, from the 16th century down to the year 1889 there was in force the law generally known as Law Eleven of Toro, which later came to form Law 1, title 5, of Book X of the Novísima Recopilación; second, from 1889 to 1902 they were governed by the applicable provisions of the Civil Code of Spain, which had been extended to Porto Rico; and, third, from 1902 to the present time the corresponding provisions of the Revised Civil Code, enacted by the Legislature of Porto Rico in said year 1902.

In order that the laws of these different periods may be concisely presented to the court for comparison, we insert them here, prefacing them with the suggestion that, as the law of Toro dates from the year 1505, its language is naturally archaic and not easily translatable literally, but we submit the translation following as one which does not materially depart from its true meaning:

(*Law Eleven of Toro.*)

> "In order that there may be no doubt as to who are natural children, we hereby order and direct that those shall be deemed natural children whose fathers at the time of their conception or birth could have married their mothers freely without dispensation of the church; likewise, if the father should recognize it as his child, although he was not openly living with the woman of whom it was delivered, or not with her alone.
>
> "Whenever there may be united in a child the above circumstances we direct that it be held to be a natural child."

(Civil Code of 1889.)

"Art. 129. A natural child may be acknowledged by the father and mother jointly or by only one of them.

"Art. 131. The acknowledgment of a natural child shall be made in the record of birth, by will, or by any other public instrument.

"Art. 133. A child of age cannot be acknowledged without its consent.

"When the acknowledgment of the minor is not made in the record of birth or in a will, judicial approval, with a hearing of the Department of Public Prosecution, shall be required.

"Art 134. An acknowledged natural child has a right:

"1. To bear the surname of the person acknowledging it.

"2. To receive support from the same, in accordance with article 143.

"3. To receive, in a proper case, the hereditary portion fixed in this Code.

"Art. 135. The father is obliged to acknowledge the natural child in the following cases:

"1. When an indisputable paper written by him, expressly acknowledging his paternity, is in existence.

"2. When the child is in uninterrupted enjoyment of the status of a natural child of the defendant father, justified by direct acts of the said father or of his family."

* * * * * * *

"Art. 136. The mother is obliged to recognize the natural child:

"1. When the child is, with regard to the mother, included in any of the cases stated in the preceding article.

"2. When the fact of the birth and the identity of the child are duly proven.

"Art. 137. The actions for the acknowledgment of natural children can be instituted only during the life of the presumed parents, except in the following cases:

"1. If the father or mother died during the minority of the child, in which case the latter may institute the action before the expiration of the first four years of its majority.

"2. If, after the death of the father or mother, some instrument, before unknown, should be discovered, in which the child is expressly acknowledged. In this case the action must be instituted within the six months following the discovery of such instrument."

(*Revised Civil Code of 1902.*)

"SEC. 187. Illegitimate children may be recognized in any way by the father and the mother conjointly, or by either of them.

"SEC. 188. Illegitimate children may prove their paternal and maternal descent.

"SEC. 189. A father is obliged to recognize his illegitimate child in the following cases:

"1. Where there be an authentic statement in writing made by him expressly recognizing its paternity.

"2. When publicly or privately he has shown that it is his child, or has called it as such in conversation, or looks after its education and maintenance.

"3. When the mother was known to have lived in concubinage with the father during the pregnancy or birth of the child, or when the child was born while his parents were engaged to be married.

"SEC. 191. An illegitimate child has the right:

"1. To bear the surname of the person recognizing him.

"2. To be supported by the same.

"3. To the inheritance determined in this Code.

"SEC. 198. The filiation of children shall be proved by the certificate of the birth issued by the civil registry, by the possession of the status of filiation, or by any other legal means.

"SEC. 199. Any action to claim filiation may be filed at any time within two years after the child shall become of age, and it shall be transmitted to his heirs, if he should die during his minority, or in a state of lunacy. In these cases heirs shall have five years during which to enter an action."

At the end of each of the codes of 1889 and 1902 are found certain "transitory provisions" (*disposiciones transitorias*), of which the pertinent paragraphs read as follows:

> "The changes introduced by the reforms made in the Civil Code, which prejudice rights vested according to the previous civil legislation shall not have retroactive effect. To apply the corresponding legislation in cases not expressly defined in the Revised Code the following rules shall be observed:
>
> "1. The rights originating under the legislation previous to the Revised Code from acts which took place while it was in force shall be governed by the previous legislation even though the said Code regulates them in a different manner or does not recognize them. But if the rights shall appear and be declared for the first time in the Revised Civil Code it shall have a prospective effect, even though the act which produces it shall take place under the previous legislation. Provided that it be not in conflict with or prejudicial to another right born or acquired through the operation of the said previous legislation."
>
> * * * * * * *
>
> "4. Actions and rights born and not exercised before the Revised Code goes into operation shall continue with the duration and in the terms and the extent to which the preceding legislation may have recognized them, but are subject with reference to their exercise, duration and proceedings to enforce them to the provisions of this (revised) Code."
>
> * * * * * * *
>
> "6. The rights to the inheritance of him who has died with or without a will before this (revised) Civil Code goes into effect shall be governed by the previous legislation; the inheritance of those dying afterwards with or without a will shall be settled and partitioned in accordance with this (revised) Civil Code, but carrying out testamentary provisions in so far as this Code permits."

There is a slight difference in the translation of the fourth provision above as found in the War Department edition of the Code of 1889 from the original English of the Revised Code (the former being inserted in the opinion of the court in *No. 141,* Record, p. 9), but the difference is verbal rather than substantial, and, as said by the Supreme Court in said opinion after the quotation (same page of Record):

> "The 4th transitory provision of the Revised Civil Code is the same as the 4th transitory provision of the old Civil Code."

A comparison of the respective provisions of these three sets of laws as to the *voluntary* recognition of natural children leads easily to the conclusion that the provisions of the Code of 1889, articles 131 and 133, are quite different from those of the previous law of Toro or the subsequent Code of 1902, sections 187, 188, and 198—so different as to impel the thought that a change in the law was intended by the legislators in each case, a change *from* the law of Toro by the makers of the Code of 1889, and a change again *back to* that law substantially by the enacters of the Code of 1902. The provisions as to *obligatory* recognition are also dissimilar as to the prof necessary, as shown by a comparison of article 135 of the old Code with section 189 of the new, and their only similarity is the insertion of a time limit for the *obligatory action* in article 137 and section 199, a provision which the law of Toro entirely lacked.

The opinion of the Supreme Court of Porto Ricco in *No. 141* (pp. 8-11) seems to indicate some confusion of thought and it is hard to distinguish the portion of its reasoning referring to the defense of prescription from that referring to the merits of the case as stated in the complaint But in the second paragraph attention is called to the fact that the allegations of appellant's complaint showed she was at least thirty-eight years old, and the third paragraph continued:

> "Such being the case, and inasmuch as it does not appear * * * that an action of filiation had been brought by her at any time before the institution of this suit, it is plainly evident that her right, if she ever had any, to obtain a judicial declaration involving her recognition as natural daughter was prescribed by force of law at the time when the complaint was filed."

Then, after extracting from the laws the various provisions as to limitation of actions and the fourth transitory provision defining the extent of the continued existence of rights arising before the existence of the codes, the court quotes from its previous opinion in the *Gual case* (15 P. R. Rep., 545), "construing the fourth transitory provision," and reaffirms the construction therein adopted, to the effect that rights arising before the codes existed were subject in their *duration* to the provisions of those codes; hence that appellant's right of action had prescribed under the limitation provisions of both codes in the sections aforesaid—that is, as the court expressed it (p. 10), that—

> "Even accepting, with regard to the case at bar, that the plaintiff could have exercised the action of filiation at the time of the promulgation of the Revised Civil Code, and that the term allowed in section 199 could be favorably applied to her, her action would still be barred, because the plaintiff allowed the said term to expire with excess without claiming the recognition of her right."

It is thus evident that the court held the right of action of appellant barred because of the application of both article 137 of the old Code and section 199 of the new; and, further, that it held both of those articles applicable *because of* the construction given to the fourth transitory provision of either Code, considering them to be identical. If, therefore, that construction of the fourth transitory provision was erroneous, if the *duration* of that right of action was "exempted from

the provisions of the Code" and not governed by either article 137 or section 199, the foundation for the court's conclusion fails; and, as no statute of limitations was asserted other than those two articles, prescription was not well pleaded and the court had no right to sustain defendants' demurrer upon that ground.

This branch of the case therefore turns upon the correctness of that construction of the fourth transitory provision of the codes. In adopting the construction it did the Supreme Court of Porto Rico was well aware that such construction was contrary to that previously and repeatedly announced by the Supreme Court of Spain, because in its opinion in the same *Gual case* from which quotation is made in the opinion in this case it was further said by that court (at page 555):

> "We are not unmindful of the judgment rendered by the Supreme Court of Spain on April 11, 1906, establishing the doctrine that article 137 of the Spanish Civil Code should not be understood as limiting the exercise of the action for the acknowledgment of natural children to those born under Law 11 of Toro; but against that judgment we can set up the one rendered by the same Supreme Court of Spain on December 19, 1902, where, notwithstanding the fact that it had reference to the acknowledgment of a natural daughter born under Law 11 of Toro, it sustained the opposite doctrine. Regarding the limitation of the exercise of the action for acknowledgment, we are not aware of any judgment other than the two mentioned above, which are in open contradiction to each other, and we accept the second because to our mind it is more in accord with the letter and spirit of rule four of the temporary provisions for the application of the former Civil Code."

And it has in a later case also been said:

> "The meaning of the fourth transitory provision of the Civil Code has been well discussed in the case of *Gual vs. Bonafoux*, and it is unnecessary to repeat

what is said there. We do not agree with the construction placed by the Supreme Court of Spain upon the fourth transitory provision of the Civil Code, and we think it is plain that when it speaks of the duration, it refers to the time in which an action may be brought."

Armsterdam *vs.* Puente, 16 P. R. Rep., 527, 533.

It thus stands conclusively admitted that the decisions of the Supreme Court of Spain upon this point support our contention; hence citations are unnecessary for that purpose. The question, then, resolves itself into this: Which line of decisions upon this point should receive the approval of this court? We claim that the decisions of the Supreme Court of Spain should be approved and followed for two reasons: First, because they are clearly right; and, second, because the fourth transitory provision, having been derived from the law of Spain and adopted by Porto Rico after its construction in the respect now under discussion had been settled by the Spanish court, must be considered to have been adopted with that construction as a part of it.

First Reason.

Were this statute to be regarded as one enacted by the territorial legislature, we are aware of the weight this court has said it will give to the construction placed upon its statutes by the Supreme Court of a Territory.

Copper Queen M. Co. *vs.* Arizona, 206 U. S., 474, 479.
Gray *vs.* Dye, 208 U. S., 519.
Kealoha *vs.* Castle, 210 U. S., 149.
English *vs.* Arizona, 214 U. S., 359, 363.
Co. Com'rs *vs.* New Mex., 215 U. S., 296, 305.

While these cases use varying language, the different expressions are clearly intended to be practically synonymous

and may be summed up in this sentence, taken from the *Copper Queen Mining Company* case:

> "While this court cannot refuse to exercise its own judgment, it naturally will lean toward the interpretation of the local statute adopted by the local court."

But even conceding to the provision in question, for the sake of the present argument, the character of a territorial statute, we think we may succeed in overcoming not only the "natural leaning" of this court spoken of in the above quotation, but also can convince it of the "manifest error" in construction which is made the criterion in the *English* case, *supra*. As the first step toward that end we are impelled to call the attention of this court to some misapprehensions under which the court below labored in arriving at its conclusions.

In the quotation hereinbefore made from the *Gual* case, wherein was discussed the contrary conclusion of the Supreme Court of Spain, reference was made to a decision of that court dated April 11, 1906, and against it was "invoked the decision rendered" by the same court on December 19, 1902, and the two decisions were said to be "in open contradiction to each other." A careful reading of that decision of December 19, 1902 (94 Juris. Civil, 757), will demonstrate that the question upon which the decision of the later case rested was *not directly involved*. The decision of later date was rested squarely upon the holding that a *status* of recognized natural child acquired while Law 11 of Toro was in force was a sufficient basis upon which to obtain from the court a judicial confirmation of such *status* and the possession of the property rights which it entailed. On the contrary, the plaintiff in the earlier case, though *born* under the law of Toro, did not allege nor claim a *status* of recognition under that law, but based his right upon a *single document* claimed to have been signed by the alleged father but bearing a date *prior* to the birth of the plaintiff. The court sim-

ply held that such a document, because of its priority of date, was not sufficient proof upon which to found recognition under *any* law. Neither the method nor effect of recognition under the law of Toro was involved, because the court expressly found that the child had never claimed recognition under the law, but that whatever claim of right he had was acquired *after* the old Code was enacted. Hence, when the Supreme Court of Porto Rico elected to "accept" the Spanish decision of December 19, 1902, because "more in accord with the letter and spirit of rule four," it was accepting something created by itself, not anything decided by the Supreme Court of Spain in that case.

In the same quotation from the *Gual* case the court further stated that it was not aware of any judgment of the court of Spain, other than the two above described as "in open contradiction," wherein was involved "the limitation of the exercise of the action for acknowledgment." If that statement was intended to include such limitation as applied to actions for the enforcement of rights derived from the possession of a *status* under the law of Toro—which that court seems to persist in regarding as actions for acknowledgment—its research must have been incomplete, as other such cases will be cited below among those supporting our contention that the court of Spain was correct in its construction of the fourth transitory provision.

Moreover, it is the Supreme Court of Porto Rico and not that of Spain which has shown inconsistency in its decisions upon the rights of natural children and the proper proceedings for their recognition. In the year 1905 the former court decided the case reported as *Ex parte Ramos*, 9 P. R. Rep., 439. It is described as *ex parte* because it was brought under the law governing proceedings of *voluntary* as distinguished from *contentious* jurisdiction. The petition prayed the trial court to declare Pedro Alcántara the intestate heir of one Aurel Mergé because of a recognition as his natural child contained in a certificate of baptism. As the regulations

then governing such suits of voluntary jurisdiction required notice to be given only to the proper government official, that official appeared and opposed the petition, and the trial court denied it. Upon appeal the Supreme Court, while affirming the judgment because the certificate of baptism (which appeared to be defective) without other proof was not *sufficient evidence* of a recognition, concluded its opinion by saying (p. 443):

> "When documents properly proving the quality of heirs are lacking, as occurs in the present case, but *proofs of a different kind* sufficient to show the natural filiation could be presented, we see no objection to applying the procedure which is established by chapter 3 of the law governing special legal proceedings approved on the 9th day of March of the present year."

Chapter 3 of the law of March 9, 1905, is found on page 218 of the "Laws of 1905" of Porto Rico and is entitled "Declaration of Heirship"—wherefrom it is plainly to be inferred that at that time the Supreme Court held the opinion that natural children possessing non-documentary proofs of recognition by the parent might make such proofs the basis of being judicially declared the heir of the parent. Yet five years later the same court made the following declaration:

> "Diligence of counsel has been unable to find any authority for the contention that an act of filiation is unnecessary where natural children have been acknowledged as in the case before us (*i. e.*, where proof was non-documentary). There is no authority for sustaining that if they have been so acknowledged they need only appear before the court and ask for a declaration of heirship in the same way as legitimate children."
>
> Armsterdam *vs.* Puente, 16 P. R. Rep., 527, 532.

A rather notable example of judicial amnesia. Moreover, not only one but several decisions to the same effect can be found in the reports of the Supreme Court of Spain. One such, in which the statement is very explicit, was rendered on June 28, 1895, upon the following state of facts: The child was born in 1869, the father died in 1889, and the collateral heirs shortly thereafter petitioned for a "declaration of heirship" in their favor. The child had never been recognized by formal document or the judgment of any court, but intervened through its guardian in the proceeding of the collateral heirs, alleging a *status* as recognized natural child because of continual treatment as such from his birth and asking that he also be declared an heir. The Supreme Court sustained that procedure and in declaring the principle said:

(*Translation.*)

> "The possession of the *status* of natural child requires nothing more than the continuation of acts which present a person in the uninterrupted relation of a natural child, and *excludes the necessity* of being newly recognized in the form required by the Civil Code."
>
> Juris. Civil de Esp., vol. 77, p. 880.

Other cases to the same effect are the following, identified by date of decision and volume and page of report, since cases in those reports are not entitled by name: March 2, 1865, vol. 11, p. 241; January 10, 1874, vol. 29, p. 113; March 26, 1904, vol. 94, p. 695, and July 9, 1896, vol. 80, p. 111. Several of these are again referred to in another connection.

In marked contrast to the inconsistency and vacillation shown in the foregoing decisions of the Supreme Court of Porto Rico touching the rights of natural children, those of the Supreme Court of Spain show clearness, consistency and continuity. Concerning the particular point now under dis-

cussion, to wit, the construction of the fourth transitory provision of the Code of 1889, the decisions naturally begin several years after the adoption of that Code, but we find one as early as July 9, 1896, which is followed by another of September 23, 1898. In this latter a mother had sued the alleged father to compel the recognition of her child, so there can be no question that it was an "action for filiation." The child had been born in 1884, but the suit was begun after the Code of 1889 was in force and was based upon a claim of *status* acquired before the Code, under the law of Toro, and evidenced solely by acts *in pais*. The lower courts decided in favor of plaintiff, adjudging the father to execute a notarial document of recognition. The latter appealed on the ground that the judgment violated even the law of Toro, if that were applicable, but the principal claim was that article 135 of the Code was applicable, instead of the law of Toro, because of the fourth transitory provision. In answer to these contentions the court said:

(*Translation.*)

"In order that a child born in the time of Law 11 of Toro of parents who were capable of contracting marriage without dispensation be considered a natural child, it is sufficient under the decisions construing that law that the parent may have recognized the child either expressly or tacitly, whether such recognition be written or verbal.

"Contrary to the contention of appellant, it is clear that the law of Toro is applicable to a child who invokes it, because his rights arose when the same was in force, since the fourth transitory provision of the Code only gives retroactive force to those provisions of that Code which refer to the manner of exercising pre-existing rights, to their duration or to the proceedings for enforcing them, *no one of which includes* the provision of article 135 *relating to the recognition* of the paternity of natural children, because it is evident that *recognition affects the very existence of the right*, as likewise it is the act which

determines the right in favor of the child who, by reason of his birth, has capacity to be recognized. Consequently, the judgment appealed from does not involve any of the errors alleged in support of the appeal; wherefore, taking as proven, among the other facts of secondary importance in the decision of this case, the fact that appellant has recognized the paternity of the child, although he may have done so merely verbally, and *as the right claimed was acquired prior* to the Civil Code, the court could and ought to have sustained the complaint *according to the law of Toro.*"

Juris. Civil de Esp., vol. 84, pp. 771, 773.

Still another case of similar application is that decided on April 11, 1906, where the court expresses itself as follows:

(*Translation.*)

"Where, as in case of the present appeal, there is involved a natural child whose rights are held to be governed by the Law 11 of Toro, and it has been believed and found by the trial court that these rights have been recognized by the father previous to the publication of the present Code (1889), it is proper to apply the first transitory regulation of this Code in its full scope, without it being possible, under such a supposition, to be understood that any restriction is placed upon the bringing of the suit to obtain from the courts the sanction of such recognition according to the provisions of article 137 of said Code, since the fourth transitory regulation itself prescribes that rights existing and not exercised before the Code went into effect shall continue to the extent and according to the terms which the former legislation concedes to them; and the *right thus recognized in the natural child* in all its necessary extension *would become diminished* and its *force and efficacy taken away if,* in spite of its having occurred at a time previous to the publication of the Code and under the conditions of the law of Toro, *there should be given to the second part of that fourth regulation the meaning and interpretation which the appellant*

> *claims* in his first ground of appeal, a contention which might be more plausible if the acts of recognition attributed to the father should all have occurred subsequent to the publication of the Code."
> Juris. Civil de Esp., vol. 104, p. 74.

Although perhaps superfluous, we are tempted to quote briefly from a case still more recent because of the coincidence that, although the litigation took place in Spain, the child was born in Porto Rico in 1845. The alleged father and returned to Spain, where he continued to live until 1901, when he died possessed of a large estate, and the natural child began there in 1902 the suit, which is described as an "ordinary declaratory suit." She set up as the basis of her claim various acts *in pais* resulting in a *status* of recognized natural child continuing from birth to the time of the father's death. No formal recognition within the provisions of article 135 of the Code of 1889 was claimed or proven. Among the defenses were the prescription of the action and the failure to allege the bringing of a prior suit establishing a "recognition in form." The judgment of the trial court was in her favor, declaring: first, that she was the natural daughter of the alleged father; second, that she had the right to use his name; and third, that as such natural child she had the right to receive her legitimate portion of the inheritance. The intermediate court of appeals reversed that decision and sustained the defense of prescription. The Supreme Court in turn reversed the decision of the intermediate court and affirmed that of the Court of First Instance, its first "considerando" stating as follows:

(*Translation.*)

> "As the facts on which the complaint which is the origin of this suit is fundamentally grounded occurred prior to the publication of the Civil Code, the law applicable, according to the provisions of the first of the transitory rules of said Code, so recognized in

the judgment appealed from, is that which was at that period in force; that is, Law 11 of Toro, which regulated the concept of natural children. That law was invoked in the complaint and can be considered, although certain precepts of the Code were also depended on, since under the legal principle stated therein in paragraph 6 are cited various decisions of this Supreme Court necessarily based upon said law of Toro; and, this being admitted, it is undoubted that the *court appealed from,* upon dismissing the complaint for the reason that the *action has been prescribed* on account of being brought after the death of Don Antonio Morea, *applying for that purpose article* 137 *and the fourth transitory provision* of said Code, *violated both those legal precepts* because of *unwarranted application,* since, as the *jurisprudence of this court has repeatedly declared,* the transitory provision indicated *refers to matters purely of procedure,* and *the right* which said Law 11 of Toro sanctions *is substantive,* even in that which relates to the permanence of the action, independent of every question of procedure.

Juris. Civil de Esp., vol. 111, p. 124.

See also,

Decision of April 2, 1909; Juris. Civil, vol. 114, p. 363.

There could be no pronouncement of any court clearer or more logical than those contained in these decisions—principles which it is said that court "has repeatedly declared," and which are, as collected from the various decisions: that the fourth transitory provision is confined in its application to matters purely of procedure; that the recognition of a natural child is not matter of procedure but affects the very existence of the right to claim and receive its legal consequences, hence is substantive in its nature even in respect to the permanence of the action to obtain it; and that a construction which would allow such substantive rights, acquired before the existence of the Civil Code, to be

subjected to the restriction of its provisions by reason of the fourth transitory provision of the same would diminish such rights in their necessary extension and deprive them of their force and efficacy under certain circumstances. Therefore, such construction must be rejected as contrary to its reasonable meaning.

We feel confident that this reasoning and this conclusion are so logical and clearly correct as to impel this court not to follow its inclination to "lean toward" the contrary conclusions of the Porto Rican court, but to declare that the latter has committed the "manifest error" which must be corrected, even looking at the statute as a territorial enactment, since, under such circumstances this court "cannot refuse to exercise its own judgment."

Copper Queen Co. *vs.* Arizona, *supra.*

Second Reason.

There is, however, no necessity of making the concession that this fourth transitory provision should be regarded as a territorial statute, in the sense that its construction was a matter to be determined as one of first impression by the Supreme Court of Porto Rico. That court itself admitted in its opinion in this case, as hereinbefore quoted, that said provision as contained in the Revised Code of 1902 was "the same as," hence a re-enactment of, the fourth transitory provision of the Code of 1889.

Now, the Civil Code of 1889 was the Civil Code of Spain extended to Porto Rico in said year 1889 by royal decree, and continued in force in Porto Rico as a Spanish law from that year until the Treaty of Paris, or rather until the military occupation of Porto Rico by the United States on October 18, 1898, when it was allowed to remain in force as a part of the "provincial and municipal law" by General Orders No. 1, issued by the commanding general of the Department of Porto Rico, on that date; and, thereafter, it

was continued in force by section 8 of the act of Congress of April 12, 1900 (31 Stats. at Large, 85), known as the civil government act for Porto Rico, until the enactment of said Revised Code in 1902. Moreover, the rights claimed by these appellants in their complaints were rights bestowed by the laws of Spain while Porto Rico was a Spanish province, and, if they were to be taken away by Spanish laws subsequently enacted, such deprivation should be at least in accordance with those laws as construed by the Supreme Court of Spain itself, not by a new construction put upon them by the territorial court of the new sovereignty.

Indeed, this court has recently so held in a case quite similar in principle to these cases at bar, although the form of suit was different as the decedent had left a last will and testament and plaintiff was claiming an accounting from the executor. The testator had died in 1879 and plaintiff claimed his rights under a law of Hawaii enacted in 1866, which had been expressly construed by the highest court of that country, while it was still an independent sovereignty. That law, like the Code in the present cases, had been continued in force by an act of Congress after the annexation of Hawaii to the United States, and, considering its duty under such circumstances, this court said:

> "The case at bar, however, more cogently calls upon us not to disregard the construction given to the statute by the highest court of Hawaii. Here the law in question was passed while Hawaii was an independent government, and its meaning was declared by the court of last resort of that government; and, as we have said, that law, as thus construed, was given recognition by the organic act. The subject with which the law deals, the rights which may have come into existence during the more than forty years in which the statute has been in force, admonish us that we may not overthrow the meaning given by the court of last resort of Hawaii, and which has prevailed for so many years. Indeed, as the construction affixed to the statute many years before the

islands were acquired was final, in effect that construction had entered into the statute at the time of acquisition, and must by us be considered as if written in the law."

Kealoha *vs.* Castle, 210 U. S., 149, 154.

This decision seems to us conclusive of our contention. The life of the Hawaiian statute may have been longer than that of the Spanish Code, yet the life of Law 11 of Toro (the meaning of which the court of Porto Rico also attempted to modify) was measured by centuries rather than years. No one would suggest that the exact number of years would affect the principle. As has been said by this court in many cases prior to the one just quoted from, if a statute be adopted *verbatim* from another jurisdiction, in which at the time of such adoption its construction and meaning has become settled and "final," such construction and meaning is regarded "as if written in the law."

Brown *vs.* Walker, 161 U. S., 591.
Henrietta, etc., Co. *vs.* Gardner, 173 U. S., 123.
Robinson *vs.* Belt, 187 U. S., 41.
Copper Queen Co. *vs.* Arizona, *supra.*

As the Supreme Court of Porto Rico itself admitted, and as it is a matter of undisputed common knowledge, that the Civil Code of Spain, including its transitory provisions in this case applied, was transferred bodily to Porto Rico, and continued bodily as the law of that territory—in substance, even to the present time—those admitted facts, applying to them the law as declared in the foregoing decisions, lead irresistibly to the conclusion that the Supreme Court of Porto Rico was in duty bound to follow the Supreme Court of Spain in its construction of the fourth transitory provision, under which construction the statutes of prescription interposed as a defense were not applicable to the case made, or to the case which the court of Porto Rico mistakenly held to have been made.

Hence, under either of the aspects above argued, the demurrer on the ground of prescription presented no good ground of defense to the cause of action of either appellant, and the respective courts below committed reversible error in sustaining them on that ground.

II.

Causes of Action Alleged Entitled Appellants to Relief Prayed.

In respect to the sufficiency of the causes of action upon their merits, as stated in the relation of the facts at the beginning of this brief, we believe there is no difference in principle between that stated in the complaint in No. 141 and that in the bill in equity in No. 160.

It is doubtless true that the facts in No. 141 more strongly outrage the moral sense, because the parents of that appellant had every reason to believe they were contracting a legal marriage and lived in that belief, regarded by the community surrounding them as legitimate husband and wife—and it was only after the death of the husband and father that the technical invalidity of the marriage was averred by the collateral relatives in order to deprive appellant Emilia Rijos of her inheritance.

In No. 160, on the other hand, no pretence of actual marriage is made; but, as is demonstrated by the terms of Law 11 of Toro, the existence of concubinage and cohabitation without marriage and the probability of offspring therefrom to be provided for have always been recognized by the Spanish law, and varying provision for them according to the moral sentiments of succeeding generations has been expressly made therein. Similar statutes are not unknown in our own country, and this court itself has suggested in their defense that "the children embraced by them are not re-

sponsible for the state of things, and that it is unjust to visit upon them the consequences of their parents' sins.

Cope *vs.* Cope, 137 U. S., 682.

Under the substantial allegations contained in each pleading, the case made is that of a recognized *status* as a natural child acquired while the law of Toro was in force. Each had reached the age of fourteen or more before the first Code was promulgated, and the father of one died in 1869 while the father of the other removed to Spain in 1889; so that the *status* of both was not only acquired and perfected under the law of Toro but remained without practical opportunity for change from the time of the promulgation of the Code. Each is, therefore, a clear-cut case of a right acquired and vested under the law of one period attempted to be denied because of the requirements of laws enacted at a subsequent period.

Having disposed under the previous head of the question of possible deprivation by prescription, we proceed to inquire by what process of reasoning the Supreme Court of Porto Rico reached the conclusion that, prescription apart, appellant Emilia Rijos was not entitled to recover her share of the estate left by her father. For that purpose we turn to the latter part of the opinion of that court in No. 141 (p. 11) and find the following statement:

> "The natural child derives its right as such from the recognition and in order that the recognition should be considered as made, and have legal effect, it is necessary that the same be made by the father in a solemn manner, with a firm will to make the same, and that a solemn and authentic record thereof be made.
>
> "When, under the laws of Toro, a father executed some acts tending to establish his paternity, which acts, taken by themselves, did not constitute a solemn recognition, and of which no solemn and authentic record was made; when the cases provided for by section 137 of the old Civil Code occurred; and when

> those provided for by section 189 of the Revised Civil Code, now in force, arise; then the action of filiation should, and must, be brought, and the recognition should, and must, be made to appear by the solemn declaration of a competent court."

The translation of the latter paragraph is not very well done, but the meaning undoubtedly is that, whether the case stated is a claim of a *status* under the law of Toro, or of a recognition within the classes specified in article 135 of the old Code, or of one within the like classes described in section 189 of the new Code of 1902—the printing of 137 in place of 135 being evidently an error, as it was meant to correspond with 189 of the new—a plaintiff must allege either that the recognition, if voluntary, was evidenced by some solemn, authentic act or record, or that, if involuntary, it was solemnly declared by some competent court; while a recognized *status* evidenced solely by acts *in pais*, however uncontradicted and convincing, would be held to be insufficient.

That such is its meaning is confirmed by the language of that court in a later case already quoted but here, for convenience, repeated:

> "Diligence of counsel has been unable to find any authority for the contention that an act of filiation is unnecessary where natural children have been acknowledged as in the case before us (by acts *in pais*). There is no authority for sustaining that if they have been so acknowledged they need only appear before the court and ask for a declaration of heirship in the same way as legitimate children."
>
> Armsterdam *vs.* Puente, 16 P. R. Rep., 527.

And it is to be borne in mind that this Armsterdam case was also one based upon the claim of a *status* provable by acts *in pais* under the law of Toro, so that this last declaration must be intended to include that class of cases. So it seems legitimate and logical to conclude that the Supreme Court

of Porto Rico, after giving preference to the ground of prescription as the basis of its decision in No. 141, intended also to hold that in cases of that character no *status* provable only by acts *in pais* could be sufficient basis for a natural child to claim his property rights, whether that *status* were acquired under the law of Toro or some later enactment.

In considering whether that holding is correct as applied to the cases at bar, where the *status* under the law of Toro alone is involved, we are again brought to face the question, To what court should we look for the authoritative interpretation of the law of Toro? If the Code of 1889 is, as we have contended, to be regarded as a Spanish law, much more so must be the law of Toro. As it has never been in force in Porto Rico since long before the change in sovereignty, except as a source of rights *vested* under it *prior to* the Code of 1889, the Supreme Court of Porto Rico, constituted under American sovereignty, cannot be warranted in regarding it as a law of the *forum*, but should approach its interpretation as that of a *foreign* law. When the law of Toro was abrogated and superseded in 1889, the final arbiter of its interpretation was the Supreme Court of Spain—and the same court should be considered the final arbiter today when that interpretation will affect and control rights acquired and fixed under it while it was in force.

We therefore now propose to show that the above holding of the Supreme Court of Porto Rico that some solemn act of filiation or judgment of a court was necessarily precedent to an action to enforce the rights of a natural child, possessing a *status* as such under the law of Toro, has no foundation in the decisions of the Supreme Court of Spain. And, in order to show more clearly that the contrary doctrine has been adhered to consistently without regard to change of other laws, we divide the decisions into two periods, before and after the promulgation of the Code. . . . . .

(1) *Prior to 1889 the status of natural child under Law 11 of Toro could be proven by evidence of acts in pais at the trial of the same suit brought to enforce rights derived from the possession of such status.*

The set of reports known as "Jurisprudencia Civil de España" are the only printed reports of the decisions of the Supreme Court of Spain available in Porto Rico, and they reach back hardly to the middle of the last century. In the earliest decision we have found the law is stated to have been "already decided." The following are cited from that set of reports:

Decision of March 2, 1865 (vol. 11, p. 241).

In this case the facts were that a child, baptized as Francisco José, of unknown parentage, in the year 1841, brought suit by his guardian in 1862 against Juan Villalonga, as sole heir of his brother Ygnacio, alleging that plaintiff was the natural child of said Ygnacio, setting forth acts of recognition tending to establish his *status* as such, but claiming no formal declaration, and praying that he be declared the natural child of deceased and be given the inheritance thus belonging to him. The defendant questioned the sufficiency of such allegations to warrant relief and the trial court decided for defendant. The intermediate court of appeal reversed that holding, declared plaintiff an heir, and adjudicated him a share of the property. Defendant then appealed to the Supreme Court, assigning as error that although recognition might be tacit as well as express, yet in such case the evidence thereof must be *conclusive* according to the law of Toro—which principle had been violated by applying to the proof the ordinary rules of evidence. The Supreme Court, in affirming the judgment appealed from, said:

> "According to Law 1, Title 5, Book X of the newest revision, 11 of Toro, in order that one be considered a

natural child it is sufficient that he be born of parents who at the time of conception or birth might have married without dispensation, and that the father recognize it as his own.

"In order that such recognition be valid it is sufficient that it appear *by any of the modes of proof* which the law prescribes, as this Supreme Court has *already decided*, and that the proof has been held sufficient by the trial court."

Decision of January 10, 1874 (vol. 29, p. 113).

This case is quite similar to the preceding. The child was a minor and the suit was brought by his guardian directly against those who had been declared heirs of his natural father, claiming the rights of a coheir in the estate of the decedent. The Supreme Court sustained his right to bring suit and granted the relief prayed.

See also the following decisions of similar import: October 8, 1853, vol. 1, p. 220; January 26, 1865, vol. 11, p. 77, and June 30, 1865, vol. 11, p. 921.

(2) *From 1889 until the present day the status of natural child acquired under the law of Toro is recognized as conferring a continuing right to the property interests legally accruing from its possession enforceable under ordinary rules of evidence and by ordinary procedure as in case of other property rights.*

Decision of June 28, 1895 (vol. 77, p. 880).

This decision has already been cited in the argument of the *first reason* for approving the decisions of the Spanish court upon the construction of the fourth transitory provision of the Code, but we cannot refrain from again quoting the terse statement made in its "considerando":

(*Translation.*)

"The possession of the *status* of natural child requires nothing more than the continuation of acts which present a person in the uninterrupted relation of a natural child, and *excludes the necessity of being newly recognized* in the form required by the Civil Code."

Decision of July 9, 1896 (vol. 80, p. 111).

In this case the children were born within about two years before the promulgation of the Code of 1889, and it is important as showing that even that short time was held sufficient for the babes to acquire and establish a *status* of recognition under the law of Toro which was recognized and enforced where suit was brought after the Code went into effect.

Decision of September 23, 1898 (vol. 84, p. 771).

This decision also has been already cited and quoted from under the same head as that of June 28, 1895, *ante*, that is, under the *first reason* treated in the discussion of the fourth transitory provision. The first paragraph there quoted is here applicable.

Decision of November 29, 1899 (vol. 88, p. 430).

This decision is interesting because of the prominence of the parties involved and valuable because the large interests at stake doubtless caused the employment of the ablest counsel and a most extensive research of precedents. The Márques de Vista-Alegre died in 1893 testate, the will alleging that he was a bachelor and had no descendants. In 1896, two children of the age of 14 and 9 years respectively brought suit, through their guardian, against the executors of the will, alleging that they had acquired a *status* as natural

children of the Márques *before* the promulgation of the Civil Code and as such had the right to inherit according to that Code, as the father's death had occurred *after* the Code was in force, and praying that their inheritance be set apart and delivered to them. No basis of recognition except the *status* resulting from acts *in pais* was claimed. The decision was in favor of the children in both the inferior courts. The Supreme Court affirmed these decisions, stating the following conclusions:

> "1. That the courts below were right in finding a *tacit* recognition of the children by the Márques by considering *all classes* of proof, and that such recognition was sufficient.
>
> "2. That, under the fourth transitory provision, the recognition of the children, occurring previous to the Code, was governed by the law of Toro, not by the Code; while the *extent* of their inheritance, although based upon a recognition established under previous laws, would be fixed by the provisions of the Code in that regard and enforced to the extent provided in it, as the inheritance was cast after the Code was in force.
>
> "3. That, for the reasons given, the *condition* of natural recognition children *carried with it* the capacity to claim all the rights inherent in that juridical concept.
>
> "4. That the direction to the executors to deliver their one-third of the estate to the plaintiffs was not inconsistent with the full compliance with their duties under the will."

The above case in effect decides every point involved in the two cases now before this court, except the question of prescription.

Decision of March 3, 1904 (vol. 94, p. 520).

In this case the natural child was born in 1852 and the father died in 1898, leaving a will which named his widow as his only and universal heir. The daughter, already married,

brought suit against the widow, claiming the *status* of a recognized child from her birth and the right to her inheritance. The widow defended principally upon two grounds: first, that the daughter had no legal standing as an heir; and second, that she could not bring such a suit after the death of the father. Both lower courts decided in favor of the daughter, and the appeal of the widow was based mainly upon the contention that under the law of Toro acts *in pais*, in order to result in a *status* of recognition, must have been done *with the intent to confer recognition for its legal effects*. The Supreme Court, however, refused to sanction that contention, affirmed the judgments of the lower courts, and repeated the earlier holding that the law of Toro "makes no distinction between express and tacit recognition *nor does it prescribe the manner of establishing it.*"

Decision of April 11, 1906 (vol. 104, p. 74).

This case is very similar in its facts to No. 160. The two plaintiffs had been born in 1869 and 1871, respectively, and the father had died in 1903. They began soon after his death an ordinary "declarative suit of larger quantity" against the brothers of the decedent who had been already declared his heirs, praying that their *status as* recognized natural children be judicially confirmed and that they be adjudged all the rights inherent in that condition as heirs. As the question of whether or not article 137 of the Code was applicable was also involved, an extract from the decision has been hereinbefore given under that head of the argument.

Decision of April 22, 1908 (vol. 111, p. 124).

This is the case, previously cited on another point, in which the plaintiff had been born in Porto Rico in 1845, and the father had lived until 1901, dying in Spain and leaving a large estate. Her suit was, like the one last cited, an "ordi-

nary declaratory suit" and she based her claim solely upon acts *in pais* resulting in a *status* as recognized natural child continuing from her birth until the father's death. No formal recognition, as required by Article 135 of the Spanish Code (1889 of Porto Rico), was alleged or attempted to be proven. One of the defenses specifically made was the absence of a prior suit establishing a "recognition in form." The judgment of the trial court was in her favor and declared: first, that she was the recognized natural daughter of the alleged father; second, that she had the right to use his name; and, third, that as such natural child she had the right to receive her legitimate portion of the inheritance. The intermediate court of appeals reversed that judgment because it held the action barred by prescription, but the supreme court in turn reversed the holding of the intermediate court and *affirmed* that of the court of first instance *in all respects*.

It is but fair to note that this decision had not been brought to the notice of the Supreme Court of Porto Rico up to the time of its decision in No. 141, and probably was not within the knowledge of its members; yet it must have been known to them at the time of their decision in the *Armsterdam* case.

We feel confident that we have now sustained our assertion of the existence of a long and consistent line of decisions of the Supreme Court of Spain supporting the position of the appellants both as to the sufficiency of their causes of action and as to the propriety of their mode of asserting their rights, and in clear contradiction upon both points to the positions taken by the Supreme Court of Porto Rico in No. 141. We believe we have also again demonstrated by these citations that the law as declared by the court of Spain should be followed, not only because the laws involved are of Spanish origin and interpretation (previous to adoption elsewhere), but also because *that court is right*.

The error of the court of Porto Rico seems to have arisen

partly from a lack of clarity of view as to the character of the action brought. These are not "actions of filiation," as it is expressed in the Code. An action of filiation is one to compel a recognition which has never existed, while the very foundation of these actions was the allegation that acts constituting recognition had existed so long and continuously as to have become a *status;* and the purpose of the actions was not "filiation" but a judicial affirmance of a *status* of filiation claimed long to have been realized, and the past (not the future) existence of which warranted and impelled the enforcement of property rights incident to such condition. The court below seems to have had this distinction in mind when, at the beginning of its opinion (p. 8), it described the action of appellant Rijos as one "involving a judicial declaration of the status of natural daughter," but later it was lost sight of in the obscurity of the language of previous decisions.

Moreover, the very arrangement of the articles of the Code of 1889 confirm the idea that the restrictions of article 137 have no relation to cases of voluntary acknowledgment or recognition. Mark that arrangement. Cases of voluntary recognition are first dealt with, beginning with article 129, which says that a natural child "*may* be acknowledged by the father and mother," etc. The several succeeding articles also treat of voluntary acknowledgment, until we reach article 135. In that article the contrary phase of the matter is taken up. "The father is *obliged* to acknowledge the natural child" in the cases specified. Article 136 fixes in like manner when the *mother* is *obliged* to do the same. *Then* comes the article (137) which treats of "*actions* for the acknowledgment," etc. Actions are necessary only when rights are *denied,* and the actions here intended relate solely to the policy of *obliging* the *unwilling* and should have no effect upon the voluntary relations between parents and children where recognition of that relation has always existed. In the present cases there was no need of any *action* in the

lifetime of the parent because the condition of filiation had been voluntarily assumed. The parent during life had never denied it—indeed, in No. 141 had died believing that his daughter was a *legitimate* child—yet it was permitted to other heirs to avoid the legal effects of the ancestor's *volition* conferring the status of filiation upon his child.

III.

The Law of Porto Rico Fixes No Limitation of Suits Between Heirs.

Although the only question of prescription raised below was specifically based upon the statutes which have been discussed, and although no other statute of prescription applicable to the cases is suggested here, we wish to make clear that *no* limitation of action barred these suits.

The complaints respectively allege that the plaintiffs were at that time, and had for a long time been, in the eye of the law, *recognized natural children* of their respective fathers, that as such they had been *heirs* of said fathers from the moment of their death and, as heirs, entitled to inherit an aliquot part of the estate left by them, and they prayed the court to enforce that right of inheritance by adjudging to them their share of the respective estates. Therefore these were suits by one heir against other heirs, or suits among co-heirs, and as to duration were expressly governed by an article of the Code of 1889 which has been transcribed literally into the Revised Code of 1902 as section 1866, and which reads as follows:

> "Art. 1965. Among *coheirs*, co-owners, or proprietors of adjacent estates, the action to demand the division of the inheritance, of the thing held in common, or the survey of the adjacent properties does not prescribe."

This article specifies three classes of persons, whose condition it considers similar, and removes the limitation upon one character of action from each. Hence, as applied to the present cases, it may be read: "Among coheirs the action to demand the division of the inheritance does not prescribe." We submit that these cases at bar were actions of that class, hence that no other statute of limitation could apply.

While the Supreme Court of Spain did not specifically name the above statute as its authority, it *has* expressly stated the same conclusion, that the law fixes "no limitation of time for bringing" an action of precisely similar character. (Decision of December 28, 1906, vol. 105, p. 1056.)

IV.

If this court were allowed to divorce itself wholly from the consideration of precedent and from the duty of following conclusions settled by the properly ultimate authority of other jurisdictions (as often occurs in matters of State laws of property), we should not fear the result of a consideration of the questions here involved in the pure light of reason and logic, as well as of an enlightened public policy. Where a natural child is living in harmony and concord with, or under the protection of, its father, treated perhaps in a manner very similar to the legitimate children, if any, and those conditions continue until the natural reaches majority and beyond, it seems to us neither reasonable nor politic to require the child, now grown to manhood or womanhood, to bring discord into the family, perhaps deprive himself of present support, comfort, and affection, and advertise to the world a shame which may have been forgotten, by forcing a father to sign some formal document of recognition, or, in case of refusal even enter upon a contest in the courts—at the cost of forfeiture of a right which the father has never denied, and which it is distinctly against the public interests to

have forfeited. Such a construction of the law, we submit, should not be tolerated unless clearly unavoidable.

We respectfully urge that the judgment and decree of the courts below in these cases be reversed, with directions to require the respective defendants to defend upon the merits.

Respectfully submitted,

N. B. K. PETTINGILL,
Counsel for Appellants in Nos. 141 *and* 160.

CORDOVA *v.* FOLGUERAS Y RIJOS.

DUMEY *v.* HERNANDEZ Y BELLO.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

Nos. 141, 160. Argued January 23, 1913.—Decided February 24, 1913.

During the lifetime of the ancestor no heir has a vested right to inherit from him; and heirs only have such rights of inheritance as are given to them by the laws in force at their ancestor's death.

It is not an interference with vested rights to prescribe the mode of procedure, or the time within which to enforce them, provided reasonable time be given therefor.

Under the laws of Porto Rico, while Law Eleven of Toro as to effect of acts of recognition of rights of natural children may be in force, the provisions of §§ 133 and 137 of the Code of 1902 must be complied with in order to enforce such rights; and this applies to persons whose alleged parent died prior to the enactment of the Code.

Decisions of the courts of Spain rendered after 1898, construing Spanish law applicable to possessions ceded to the United States, although entitled to great consideration, do not preclude the local court from reaching an independent judgment.

16 Porto Rico, 593, affirmed.

5 Porto Rico Fed. Rep. 191, affirmed.

THE facts, which involve the construction of the law of Porto Rico in regard to actions for acknowledgment of natural children, are stated in the opinion.

Mr. N. B. K. Pettingill for appellants.

No appearance for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

The first of these suits was brought by the appellant, in 1908, it would seem, to have herself declared a natural daughter and entitled to a share of the estate of Don Santiago Rijos Correa, who died on April 29, 1869. The appellees demurred to the complaint on the grounds adverted to in *Burnet* v. *Desmornes*, 226 U. S. 145. By the Civil Code of 1889, Art. 137, actions for the acknowledgment of natural children can be instituted only during the life of the presumed parents, or if the parent dies during the minority of the child within the first four years of its majority. If the appellant was not of age at the death of Correa, she reached majority at the latest in 1893, and the action was barred in 1897. (Under the Code of 1902, § 199, the action is allowed only for two years after coming of age.) The Supreme Court sustained the demurrer and dismissed the complaint.

The second suit, begun in June, 1909, had a similar object. The appellant alleged that she was born on August 4, 1875, and was a natural child of Damian Morell; that he left her mother and married in 1880; in 1889 removed to Mallorca, and died on December 29, 1899. On demurrer the bill was dismissed by the District Court, following the authority of the foregoing decision of the Supreme Court. (We may assume that as the plaintiff retained her domicil in Porto Rico and as a considerable part of the estate consisted of land in the same place, the possible bearing on the case of the removal of Morell to Spain need not be considered.)

The appellants say that at the time of their birth the

law in force was Law Eleven of Toro (Law 1, Title 5, Book 10, Novisima Recopilacion); that under that law they acquired the status and rights of natural children by the facts alleged in their complaints, without the need of acknowledgment by public document or judicial approval as required in the Civil Code of 1889, Art. 133, and so that they were entitled to sue for their share of the inheritance at once.

So far as the second case goes, perhaps it would be a sufficient answer to say that during the lifetime of an ancestor no heir has a vested right to inherit from him; that the Civil Code of 1889 confines the right of natural children to inherit to those children that are acknowledged, § 134, that is, presumably, to those that are acknowledged as it provides; and since heirs have only such rights of inheritance as are given to them by the laws in force at their ancestor's death, that there is no reason why the appellant should take greater ones because she had been informally acknowledged before 1889.

But in the first case the alleged parent died before the Civil Code was enacted, and so it would seem that the plaintiff had ground for claiming rights by inheritance vested before that date. But this claim was met by the Supreme Court by a reference to the statement of motives for the Civil Code which reads that if it was proper to give effect to rights acquired under prior legislation, no consideration of justice required that the subsequent exercise of them 'as well as their duration and the proceedings for enforcing them should be exempted from the provisions of the Code;' and by the interpretation of the fourth Transitory Provision (following Art. 1976). This reads in the official translation, "Actions and rights arising before this Code became operative, and not exercised, shall continue with the extension and according to the terms recognized by prior legislation, but shall be subject, with regard to the exercise, duration, and proceedings

for enforcing them, to the provisions of this Code." Th court interpreted these words as meaning that, in orde to enforce the rights of a natural child when there wa not a solemn recognition, but only acts tending to estab lish paternity under the Laws of Toro, an action of filia tion must be brought as required by Articles 133 and 13 of the Code.

In other words, while, under the Laws of Toro, th acts of recognition alleged, although not amounting to solemn recognition, may have entitled a natural chil to sue for her share of the inheritance and to prove th acts in the same suit, the Code requires a preliminary pro ceeding to prove those acts and to declare their effect and limits the time within which such proceeding can b brought. This hardly can be called an interference wit vested rights, when a reasonable time for bringing th preliminary proceeding is allowed. In the present cas it does not appear that the plaintiff had not reasonabl time for an action after the Code went into effect.

It is objected that the Supreme Court of Spain ha construed the fourth Transitory Provision otherwise, a has been recognized by the Supreme Court of Porto Rico *Gual* v. *Bonafoux*, 15 Porto Rico, 545, 555, referring to judgment of April 11, 1906, but citing as contradictor one of December 19, 1902, that it deemed correct. Th Spanish decisions, however, have not the same effect a do those construing a statute subsequently copied b another State. They were rendered after Porto Rico ha ceased to be subject to Spanish jurisdiction, and althoug entitled to great consideration, which no doubt they re ceived, they do not preclude the local court from exercis ing an independent judgment. The construction adopte in Porto Rico at least does no violence to the words o the statute; it concerns local affairs under a system wit which the court of the Island is called on constantly t deal, and we are not prepared, as against the weight prop

erly attributed to the local decision, to say that it is wrong. *Gray* v. *Taylor*, *ante*, p. 51. How the first case should have been dealt with if it had appeared in the record that the plaintiff came of age before the Code went into effect we are not called upon to consider. The construction adopted might give trouble unless a right to bring an action of filiation within a reasonable time were implied. But we have to remember that the law-making power of Spain was not restricted in the way familiar to us.

141. *Judgment affirmed.*

160. *Decree affirmed.*

(22,357)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 150.

FRANK LUKE AND JOHN LUKE, APPELLANTS,

vs.

JESSE HOYT SMITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a In the Supreme Court of the State of Arizona.

No. 1123.

FRANK LUKE and JOHN LUKE, Appellants,
vs.
JESSE HOYT SMITH, Appellee.

Joseph H. Kibbey, Esq., and Walter Bennett, Esq. (of the law firm of Kibbey, Bennett & Bennett), attorneys for Appellants.
C. F. Ainsworth, Esq., and Lewis M. Ogden, Esq., attorneys for Appellee.

On Appeal from the District Court of the Third Judicial District of the Territory of Arizona in and for Maricopa County.

Be it remembered that on to-wit: the twenty-ninth day of July, 1909, came the appellants in the above entitled cause, by their attorneys, and filed in the Clerk's office of said court, in said entitled cause, a certain Abstract of Record, in words and figures following, to-wit:

1 ABSTRACT OF RECORD.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JESSE HOYT SMITH, Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife, and FRANK LUKE, Defendants.

Original Complaint.

Comes now the above-named plaintiff, and for cause of action respectfully shows to this Court:

First. That he, said plaintiff, and the defendants, William J. Rainey and Lillian Rainey, his wife, are each and all
2 non-residents of the Territory of Arizona. That the defendant Frank Luke resides in the City of Phœnix, County of Maricopa and Territory of Arizona.

Second. That on or about the 20th day of March, 1897, the plaintiff and the defendant William J. Rainey became the owners in fee simple of the following described property; the plaintiff being the purchaser of a two-thirds interest and the defendant William J. Rainey being the purchaser of the remaining one-third interest in the said property, to-wit:

Section 22, Township 2 North, Range 3 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona; except the

Northwest one-quarter (N. W. ¼) of the Northwest one-quarter (N. W. ¼) of said section.

Third. That the purchase price for said property was the sum of Eighteen Thousand (18,000) Dollars, all of which said sum was advanced and paid by this plaintiff.

Fourth. That on the same day, to-wit, on said 20th day of March, 1897, this plaintiff and the said defendant, William J. Rainey, duly entered into a written contract wherein and whereby it was among other things agreed that this plaintiff and said defendant having joined in the purchase of said property for the purpose of platting, grading and otherwise improving said property, and as so improved to sell and dispose of the same, that this plaintiff should advance all the money necessary for the improvement of the said
3 property as contemplated by said agreement, and that this plaintiff should be repaid for all such moneys so advanced by him either in the purchase of the said property, or in advances made for the improvement of said property, as rapidly as possible from the receipts from the sale or sales or other income of said property until the same shall be fully paid with interest at six per cent per annum. And it was therein further agreed that all moneys so advanced by this plaintiff as aforesaid shall be considered as loans made by him, and that if after five years from the date of said agreement, all the money or any portion thereof so advanced shall not have been repaid to this plaintiff, with interest as hereinabove set forth, then that said defendant William J. Rainey agrees to pay on demand thereafter to said plaintiff herein, one-third (1/3) of all such loans then unpaid, including interest thereon as aforesaid.

Fifth. That this plaintiff has since said 20th day of March, 1897, advanced for the purchase of the above described property and for the improvement thereof, various sums of money, aggregating in all with interest thereon at 6 per cent per annum, *to* the sum of Sixty-five thousand three hundred and sixteen and 51-100 (65,316.51) dollars, and that no part of said sum has been repaid to this plaintiff, although demand has been heretofore made upon the said defendant William J. Rainey for the repayment of one-third of said amount so advanced, as in said above-mentioned agreement provided,
4 but that said defendant refused and still refuses to pay the aforesaid one-third of the sum so advanced by this plaintiff.

Sixth. That this plaintiff has done and performed each, every and all the agreements and stipulations set forth in the said agreement above referred to, on his part to be performed, but that said defendant has for some time past and still neglects to do and perform any of the covenants and agreements in said agreement mentioned, and refuses to further carry out said agreement.

Seventh. That the defendants Lillian Rainey and Frank Luke each claim to have some lien or interest in, on and upon the interest of the said defendant William J. Rainey in said property hereinabove described, which liens, if any there be, are each and all subject and subordinate to the lien of this plaintiff.

Wherefore, this plaintiff prays the judgment of this Court:

First. That he be declared to have an equitable mortgage lien in

and upon the interest of the said William J. Rainey in the property hereinabove described, to the amount of $21,772.17, said sum being one-third of the amount advanced by this plaintiff as hereinbefore set forth, with interest thereon figured up to the 23rd day of May, 1903, and that such mortgage lien shall in addition extend to all interest accruing up to the time of payment thereof and to the costs and disbursements incurred herein.

5 Second. That this plaintiff be declared to have a mortgage lien upon the interest of said William J. Rainey in the property hereinbefore described, which lien is prior and superior to that of the defendants herein (said Lillian Rainey and said Frank Luke), if any they have.

Third. That this plaintiff have judgment of this Court against the said defendant for the full amount so found due him, together with the costs and disbursements incurred by him herein.

Fourth. That the defendants Lillian Rainey and Frank Luke and William J. Rainey be foreclosed of all right, title, interest and equity in and to the said interest of the said William J. Rainey in and to the property above described, and that said interest of the said William J. Rainey in the property above described be decreed by this Court to be sold as under execution, and out of the proceeds of such sale this plaintiff be paid the amount found due him, together with interest and the costs and disbursements incurred herein.

Fifth. That this plaintiff have such other and further judgment and relief as may seem meet and equitable, in the premises.

C. F. AINSWORTH,
Plaintiff's Attorney.

Filed July 18th, 1903.

6 *First Amended Complaint.*

JESSE HOYT SMITH, Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE and JOHN LUKE, Defendants.

Comes now the above-named plaintiff, and by this his amended complaint herein, respectfully shows to this Court:

First. That he the said plaintiff, and the defendant William J. Rainey and defendant Lillian Rainey, are each and all non-residents of the Territory of Arizona; that the defendant Frank Luke and John Luke reside in the City of Phœnix, County of Maricopa and Territory of Arizona.

Second. That on or about the 20th day of March, 1897, the plaintiff and the defendant William J. Rainey, pursuant to and in accordance with the agreement hereinafter referred to and subject to the terms, stipulations, conditions and agreements therein contained, purchased the following described property, to-wit:

Section twenty-two (22), Township 2 North, Range Three (3) East of the Gila and Salt River Base and Meridian, Maricopa County,

except the northwest quarter (N. W. ¼) of the northwest one-quarter (N. W. ¼) of said section.

7 The said plaintiff receiving on said purchase a two-third undivided interest, and the said defendant William J. Rainey receiving a one-third undivided interest in the said property above described.

Third. That the purchase price for said property was the sum of Eighteen Thousand ($18,000) Dollars, all of which said sum was paid by the plaintiff herein.

Fourth. That on said 20th day of March, 1897, this plaintiff and the said defendant William J. Rainey, duly entered into a written agreement between themselves, wherein and whereby it was among other things agreed that this plaintiff and said defendant William J. Rainey having joined in the purchase of the above described property for the purpose of platting, grading and otherwise improving said property, and as so improved, to sell and dispose of the same, that this plaintiff should advance all the money necessary for the purchase and improvement of the above described property as contemplated by said agreement, and that this plaintiff should be repaid for all such moneys so advanced by him, either in the purchase or improvement of said property, as rapidly as possible, from the receipts from the sale or sales or other income of said property until the same shall have been fully repaid to this plaintiff, with interest on such moneys at six per cent per annum. And it was therein also agreed that all the moneys so advanced by this plaintiff as aforesaid shall be considered as loans made by him, and further

8 that if after five years from the date of said agreement, all the money or any portion thereof so advanced, shall not have been repaid to this plaintiff, with interest as hereinabove set forth, then, that said defendant William J. Rainey agrees to pay on demand thereafter to said plaintiff herein one-third (⅓) of all such loans then unpaid, including interest thereon as aforesaid.

Fifth. That this plaintiff has since said 20th day of March, 1897, advanced for the purchase of the above described property and for the improvement thereof, pursuant to the aforesaid agreement, various sums of money, aggregating in all with interest thereon at 6 per cent per annum, figured up to the 23rd day of May, 1903, the sum of Sixty-five thousand three hundred and sixteen and 51-100 ($65,316.51) Dollars, and that no part of said sum has been repaid to this plaintiff, although demand has been heretofore made upon said defendant William J. Rainey for the repayment of one-third of said amount so advanced, as in said above-mentioned agreement provided, but that said defendant refused and still refuses to pay the aforesaid one-third of the sum so advanced by this plaintiff.

Sixth. That this plaintiff has done and performed each, every and all the agreements and stipulations set forth in the said agreement above referred to, on his part to be performed, but that said defendant has for some time past and still neglects to do and perform any of the covenants and agreements in said agreement mentioned, and refuses to further carry out said agreement.

Seventh. That there is now due and owing from the said defendant William J. Rainey the sum of $21,772.17, with interest thereon from the 23rd day of May, 1903, at the rate of 6 per cent per annum.

Eighth. That the defendants Lillian Rainey, Frank Luke and John Luke each claim to have some lien or interest in, on or upon the interest of the said defendant William J. Rainey in said property hereinabove described, which liens, if any there be, are each and all subject and subordinate to the lien of this plaintiff.

Wherefore, this pla[illegible] prays the judgment of this court:

First. That he have and recover of and from the defendant William J. Rainey the sum of $21,772.17, with interest thereon from the 23rd day of May, 1903, besides the costs and disbursements of this action.

Second. That plaintiff be adjudged to have an equitable mortgage lien upon the interest of the said William J. Rainey in the property hereinabove described, to the extent of the amount found due from the said William J. Rainey to this plaintiff; and that said lien be adjudged to have accrued and become valid and subsisting against the interest of the said William J. Rainey in the property above described, since the 20th day of March, 1897; and that the liens or other interest of the other defendants Lillian Rainey, Frank Luke and John Luke, in and upon the interest of the defendant William J. Rainey in the property hereinabove described, if any there be, shall be adjudged to be subject and subordinate to the lien of this plaintiff herein.

Third. That the defendants Lillian Rainey, William J. Rainey, Frank Luke and John Luke be foreclosed of all right, title, interest and equity in and to the said interest of the said William J. Rainey in and to the property hereinabove described, and that the said interest of the said William J. Rainey in the property hereinabove described be decreed by this Court to be sold as under execution, and out of the proceeds of such sale this plaintiff be paid the amount found due him, together with interest and the costs and disbursements incurred herein, including expense of sale.

Fourth. That this plaintiff have such other and further relief and judgment of this Court as may seem meet and equitable in the premises.

C. F. AINSWORTH,
Plaintiff's Attorney.

Filed September 23rd, 1903.

Second Amended Complaint.

[Title of Court and Cause.]

Comes now the above-named plaintiff — by this his second amended complaint herein, complains of the defendants and alleges:

First. That said plaintiff and the said defendants William J. Rainey and Lillian Rainey, his wife, are each and all non-residents of the Territory of Arizona. That said defendants Frank Luke and John Luke reside in the City of Phœnix, County of Maricopa and Territory of Arizona.

Second. That said defendant Lillian Rainey was at all the time hereinafter mentioned and now is the wife of the said defendant William J. Rainey.

Third. That on or about the 20th day of March, 1897, the said plaintiff and the said defendant William J. Rainey entered into a written agreement for the joint purchase, management, control and sale of certain real property, described as Section numbered twenty-two (22), in Township Two (2) North of Range numbered three (3) East of the Gila and Salt River Base and Meridian, in the County of Maricopa, in the Territory of Arizona, except the northwest quarter of the northwest quarter of said section; which said agreement was executed and delivered by the said plaintiff and the said defendant William J. Rainey, a copy of which is hereunto annexed marked "Exhibit A," and made a part hereof, to the same extent as if herein set forth.

Fourth. That pursuant to the terms of said agreement this plaintiff advanced all the purchase price of said property hereinabove described, to-wit, $18,000, and in addition thereto, advanced for the improvement thereof, pursuant to said agreement, various sums of money, aggregating in all, with interest thereon, at the rate of six per cent per annum, figured up to the 23rd day of May,
12 1903, to the sum of Sixty-five thousand three hundred and sixteen and 51-100 ($65,316.51) Dollars, and that since said 23rd day of May, 1903, said plaintiff has so advanced the additional sum of One thousand and eighty-five ($1085) Dollars, no part of which said several sums has ever been repaid to this plaintiff.

Fifth. That all of the money so advanced as aforesaid by the plaintiff herein, was used in the purchase and improvement of the property hereinbefore described, including the undivided one third interest therein of the defendant William J. Rainey, and was so advanced under and pursuant to the terms and stipulations in said agreement hereunto annexed, contained.

Sixth. That this plaintiff has done each and every of the agreement and stipulations set forth in said agreement, on his part to be performed, but that said William J. Rainey, defendant, has for some time past neglected and refused and still neglects and refuses to do or perform any of the covenants and agreements in said agreement mentioned.

Seventh. That none of the property above described has ever been sold or disposed of, and no part of the money so advanced as aforesaid by the plaintiff herein, has ever been repaid to this plaintiff, and all of said sums of money so advanced, are still due to this plaintiff.

Eighth. That the defendants Lillian Rainey, Frank Luke and John Luke each claim to have some lien or interest, in, on or
13 upon the interest of the defendant William J. Rainey in the property hereinabove described, which liens if any there be, are each and all subject and subordinate to the lien of this plaintiff.

Wherefore this plaintiff prays the judgment of this court:

First. That this plaintiff be declared to have an equitable mortgage lien in and upon the interest of the said William J. Rainey in the property hereinbefore described, to the extent of one-third of the

several sums so advanced by the plaintiff herein for the purchase and improvement of the said property herein described, together with interest thereon, to wit: for the sum of $21,722.17 with interest thereon from the 23rd day of May, 1903, and $361.66 with interest thereon, at the rate of six per cent per annum.

Second. That said mortgage lien or equitable lien be declared to be prior and superior to any liens claimed by the defendants herein, if any they have.

Third. That this plaintiff have the judgment of this court foreclosing said equitable lien upon the interest of the said defendant William J. Rainey in the property herein described, for the full amount of said lien; that the defendants William J. Rainey, Lillian Rainey, Frank Luke and John Luke be foreclosed of all right, title, interest and equity in and to the said interest of the said William J. Rainey in and to the property herein described, and that said interest of the said William J. Rainey in the property herein
14 described, be decreed by this court to be sold as under an execution, and out of the proceeds of such sale this plaintiff be paid the amount found due him, together with the costs and disbursements incurred herein.

Fourth. That this plaintiff have such other and further relief and judgment as to this court may seem just and equitable.

C. F. AINSWORTH,
Plaintiff's Attorney.

EXHIBIT A.

Memorandum of Agreement.

This Memorandum of Agreement, Made this 20th day of March, 1897, by and between Jesse Hoyt Smith, of Milwaukee, Wisconsin, and William J. Rainey, of Cleveland, Ohio, parties hereto,

Witnesseth; that whereas the said parties have this day purchased a certain tract of land known as Section 22 Township 2, North, Range 3 East of G. and S. R. Meridian, Maricopa County, Arizona, except the N. W. ¼ of the N. W. ¼ of said Section, for the sum of Eighteen Thousand Dollars ($18,000) in cash, said tract of land having been purchased by the said parties in the proportion of an undivided two-thirds (2-3) interest to the said Jesse Hoyt Smith and an undivided one-third (1-3) interest to the said William J. Rainey according to a deed now on record in the office of the County Recorder of Maricopa County, Arizona, in book 43 of Deeds, pages 565-6-7;

15 And Whereas the said tract of land was so conveyed free and clear of all liens and incumbrances, and the full consideration for the whole thereof, being Eighteen Thousand Dollars ($18,000) was paid in cash by said Jesse Hoyt Smith, and said William J. Rainey has agreed to repay to said Jesse Hoyt Smith the one-third (1-3) thereof with interest thereon at six per cent. per annum as hereinafter provided;

And Whereas said parties have joined in said purchase for the

purpose of platting, grading and otherwise improving said property, and as so improved selling and disposing of the same at a profit.

Now therefore, the parties hereto do, and each for himself doth, agree with the other in the manner following:

First. That the improvement of said tract of land shall be commenced not later than the 1st day of January, 1898, and such improvements be thereafter continued with reasonable diligence and dispatch until the same shall be in marketable condition as lots.

Second. That the improvements aforesaid shall consist of the surveying and platting the entire tract into lots, the opening up and grading of all the streets; the planting of suitable shade, ornamental and fruit trees, and the making of all such other improvements as may be hereafter agreed upon between the parties hereto.

Third. That said Jesse Hoyt Smith, in addition to the sum of Eighteen Thousand Dollars ($18,000) so advanced by him as
16 aforesaid, shall also from time to time make all necessary advances of money for the improvements aforesaid, and also all such as shall be required for the running and incidental expenses of the undertaking, including taxes, irrigation charges, marketing said lots and the reasonable and necessary expenses of said William J. Rainey from Cleveland, Ohio, to Phœnix, Arizona, and return, and his living expenses when in Arizona while engaged in business relating to said property.

Fourth. That all money advanced by said Jesse Hoyt Smith in said purchase, as well as all such as shall be hereafter advanced by him for any of the purposes aforesaid, shall be considered and treated as a loan or loans by him, and shall be paid to him as rapidly as possible from the receipts from the sale or sales or other income of said property until the same shall be fully paid, with interest at six per cent per annum, and before any division of profits shall be made or paid.

Fifth. That if at the date of five (5) years from the date hereof, all the loans aforesaid shall not have been fully paid to said Jesse Hoyt Smith, with interest as above provided, then and in that event said William J. Rainey hereby agrees that he will on demand thereafter pay to said Jesse Hoyt Smith the one-third (1-3) of all such loans then unpaid, including interest thereon as aforesaid.

Sixth. That said William J. Rainey shall have general
17 management of said tract of land, including the improvements thereof as aforesaid, and the employment of all labor and making of all contracts necessary therefor, and also including the handling and sale of said lots when so improved; provided, however, that no contracts or other obligation on account of said property exceeding in the aggregate the sum of Five Thousand Dollars ($5,000.00) shall be entered into without the previous written consent of said Jesse Hoyt Smith, and no contract for the sale of any such lots shall be made except at prices and on terms to be agreed upon between the parties hereto; provided always that said William J. Rainey shall at all times and from time to time give to said Jesse Hoyt Smith true accounts of all transactions relating to the business, and full information in regard to all matters which shal- come to

his hands or knowledge *ters which shall come to his hands or knowledge* — -gard to his wishes and directions respecting the same.

Seventh. That said William J. Rainey shall keep full, true, correct and proper books of account of all the transactions and dealings relating to said business, which shall at all times be open to the inspection of said Jesse Hoyt Smith; and that he will on the 10th day of each month render to said Jesse Hoyt Smith an account in full of all transactions during the preceding month, including all contracts made and all disbursements and receipts, and showing all the assets and liabilities of the partnership.

18 Eighth. That said William J. Rainey hereby agrees to accept the said general management of said tract of land, without other consideration or remuneration excepting only his one-third (1-3) share in the net profits of such business as is hereinafter provided.

Ninth. That after the repayment to said Jesse Hoyt Smith of the said sum of Eighteen Thousand DoDllars ($18,000) sa advanced by him for the purchase of said tract and the repayment of all advances which shall be hereafter made by him on account of said property or said business, together with interest on all such sums at six (6) per cent per annum, the net profits of said land and business shall be divided between the parties hereto as follows: Said Jesse Hoyt Smith shall be entitled to the two-thirds (2-3) thereof, and said William J. Rainey the one-third (1-3) thereof; and the losses, if any, shall be shared between the parties in ratio aforesaid.

It is further agreed and understood between the parties hereto that this Memorandum of Agreement is made for the purpose of stating explicitly the terms of co-partnership on which the said Jesse Hoyt Smith and William J. Rainey have joined in the purchase, improvement and sale of said tract or lots, and that each will fulfill in food faith and to the best of his ability the articles herein contained. Which covenants and agreements shall extend to and bind the respective parties and their respective legal representatives.

19 In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

J. HOYT SMITH. [SEAL.]
WM. J. RAINEY. [SEAL.]

In Presence of

J. W. DADMUN.
Z. M. CHANDLER.

Filed December 31st, 1903.

Answer to Second Amended Complaint.

[Title of Court and Cause.]

Come now the defendant-, Frank Luke and John Luke, and answering plaintiff's amended complaint for themselves alone:

I.

Demur to plaintiff's amended complaint and show to the court that said complaint does not state facts sufficient to constitute any cause of action against said defendants or either of them, or for any relief whatever as against said defendants or either of them.

II.

Demurring specially to said amended complaint, these de-
20 fendants show that it appears upon the fact of said complaint that there is a defect of parties defendant in this, that these defendants are not proper parties defendant in this action.

And should the above demurrer be overruled, these defendants, answering plaintiff's amended complaint:

I.

Show to the Court that they have no knowledge or information regarding the matters and things alleged and set forth in paragraphs 2, 3, 4, 5, 6 and 7 of plaintiff's said amended complaint and therefore deny same.

II.

These defendants further answering, admit that they claim to have an interest in and lien upon the premises described in plaintiff's said complaint, and deny that their interest in said premises is subject and subordinate to any lien upon or interest in said premises held by plaintiff.

III.

These defendants further answering plaintiff's said complaint, allege: That on, to-wit, June 11, 1902, the defendant, J. W. Rainey, was the owner of and held in his own name the title of record to, and was in the possession of an undivided one-third interest in and to Section 22, Township 2 North, Range 3 East of the Gila
21 and Salt River Base and Meridian, Maricopa County, Arizona; except the northwest one-quarter of the northwest one-quarter of said section.

That on the day last aforesaid, the said defendant, W. J. Rainey, being indebted to Frank Luke and John Luke, these defendants, in the sum of $2500.00, with interest thereon at 6 per cent from April 1, 1902, the said Frank Luke and John Luke commenced an action in this Court against the said defendant W. J. Rainey to cover the said sum and interest as aforesaid. That in said action the plaintiffs therein sued out of this Court a writ of attachment for the said sum of $2500, and interest as aforesaid, against the goods, chattels, real estate and property of the said W. J. Rainey to secure the said sum of $2500 and interest as aforesaid, and caused the same to be delivered to the sheriff of Maricopa County for service. That on, to-wit, the 11th day of June, 1902, the said sheriff of Maricopa County, by virtue of the said writ of attachment, duly seized and

levied the said writ of attachment upon, and attached all the right, title and interest of the said J. W. Rainey in and to the premises above described, and on the day last aforesaid filed a copy of the said writ of attachment, together with a description of the property attached, with the county recorder of said Maricopa County, and the same was on the day last aforesaid duly filed by him and recorded in said recorder's office in a book kept by him for that purpose.

That thereafter such proceedings were had in said cause
22 that on, to-wit, June 11, 1903, the said Frank Luke and John Luke recovered a judgment from the said W. J. Rainey for the sum of $2500 with interest thereon at the rate of 6 per cent per annum from April 1, 1902, together with the costs of said action, and which judgment foreclosed the lien of said attachment upon the premises hereinbefore described as the same existed on June 11, 1902, and ordered and directed that the said premises be sold as under execution to satisfy said judgment. That at the time of the commencement of this action said judgment still remained of record in this Court, wholly unpaid, unsatisfied and undischarged.

That since the commencement of this action, and since the filing of the defendant Frank Luke's answer to the plaintiff's original complaint, to-wit, on the 6th day of August, 1903, an order of sale was duly issued out of this Court in the cause hereinbefore mentioned, directed to the Sheriff of Maricopa County, Arizona, commanding him to seize and sell as under execution the premises and property hereinbefore mentioned, to satisfy said judgment, and that by virtue of said order of sale, the said sheriff did seize the said premises and property, and, pursuant to a notice duly published and posted as required by law, did, on the 8th day of September, 1903, sell the said premises and property at public auction at the front door of the court house in Phœnix, Maricopa County, Arizona, to the highest and best bidder, and that the defendants, Frank Luke and John Luke, were the purchasers at said sale, and that thereupon the said sheriff executed and delivered to said defendants, Frank
23 Luke and John Luke, the usual certificate of purchase of said premises, and that thereafter on, to-wit, the 20th day of June, 1904, no redemption of said premises from said sale had been made, and that on said last mentioned date the said Frank Luke and John Luke being the owners and holders of said certificate of sale, the sheriff of Maricopa County, Arizona, executed, acknowledged and delivered to the said Frank Luke and John Luke a Sheriff's Deed to said premises, and that the said Frank Luke and John Luke ever since have been and now are the owners of said premises.

That the said Frank Luke and John Luke had not nor had either of them any knowledge or any notice, actual or constructive, of the existence of the alleged contract, a copy of which is attached to plaintiff's complaint as "Exhibit A," at any time prior to the filing of plaintiff's second amended complaint herein, to which a copy of said alleged contract is attached as Exhibit "A" thereof, to-wit, on the 31st day of December, 1903.

Wherefore, these defendants pray that plaintiff take nothing by this action as against these defendants.

That it may be adjudged and decreed that the lien of the attachment and judgment foreclosing the same herein set forth was a prior and superior lien upon the undivided one-third interest of said W. J. Rainey in the premises described in plaintiff's said complaint, to any claim to or interest in said undivided one-third interest
24 which the plaintiff may have by reason of any of the matters and things alleged in his complaint.

And that by said sheriff's sale and deed of said premises, the defendants John Luke and Frank Luke acquired the title to an undivided one-third interest in the premises described in plaintiff's complaint, as against the plaintiff herein and those claiming by, through or under him.

That these defendants have judgment for their costs and disbursements herein; that these defendants may have such other and further relief as equity may require.

WALTER BENNETT,
Attorney for Defendants Frank Luke and John Luke.

Findings.

[Title of Court and Cause.]

The above entitled action having duly come on for trial on the 11th day of February, 1909, before the above Court, sitting without a jury, the Hon. Edward Kent presiding, the plaintiff appearing by C. F. Ainsworth, his attorney, the defendants William J. Rainey and Lillian Rainey having been duly served with process herein and having appeared and answered by their attorneys, Chalmers & Wilkinson, and the defendant- Frank Luke and John Luke appearing by their attorney, Walter Bennett, and the parties having
25 submitted to this Court their evidence and testimony herein, and the Court being fully advised in the premises, doth find:

Findings of Fact.

1.

That on March 20th, 1897, the plaintiff Jesse Hoyt Smith, and the defendant William J. Rainey, purchased from the Arizona Land and Stock Company, a corporation, the premises described in the plaintiff's complaint for the sum of eighteen thousand ($18,000) dollars; that the *vised in the premises, having on the 27th day* sum of eighteen thousand dollars, all of which said sum was advanced and paid over to said Arizona Land and Stock Company by said Jesse Hoyt Smith on March 20th, 1897, and thereupon the said Arizona Land and Stock Company executed, acknowledged and delivered to said Smith and Rainey a warranty deed to said premises, conveying an undivided two-thirds interest therein to said Smith

and an undivided one-th-rd interest therein to said Rainey; the granting clause in which deed is in the words and figures following, to-wit:

"Have granted, sold and conveyed, and by these presents do sell, grant and convey unto the said Jesse Hoyt Smith, an undivided two-thirds (2-3) interest, and unto the said William J. Rainey an undivided one-third (1-3) interest, of, in and to all those certain premises situated in Maricopa County, Arizona Territory, as follows, to-wit:

26 Section twenty-two (22), Township Two (2) North, Range Three East of the Gila and Salt River Base and Meridian (excepting therefrom the northwest quarter (¼) of the northwest quarter (¼) of said section). Together with seven and one-half (7½) water rights in the Arizona Canal, numbering from one hundred and one (101) to one hundred and eight (108) inclusive, deeded and affixed to said premises."

And that on said 20th day of March, 1897, the said deed was duly recorded in the Recorder's office of said Maricopa County, Arizona.

2.

That during the latter part of April, 1897, namely, on or about April 29th, 1897, the said William J. Rainey and Jesse Hoyt Smith executed the contract in writing bearing date March 20th, 1897, a copy of which is attached to the second amended complaint in this cause.

3.

That on the 28th day of Nevomber, 1898, the said William J. Rainey executed and delivered to one Anthony G. Hubbard a mortgage upon an undivided one-third interest in said premises to secure the payment of a promissory note of said Rainey to said Hubbard for the sum of $3000, of even date therewith, due November 28th, 1901, with interest thereon at the rate of 8½% per annum, which said mortgage contained the following clause, namely: "And

27 the said William J. Rainey hereby covenants that he is well and truly seized of a good and perfect title to the premises above conveyed, in law, in fee simple, and has good right and lawful authority to convey the same to the party of the second part, his heirs and assigns, and that the title so conveyed is clear, free and unencumbered, and that he will warrant and defend the same forever to the party of the second part, his heirs and assigns against all claims whatsoever."

That said mortgage was duly acknowledged and was on December 6th, 1898, recorded in the office of the County Recorder of Maricopa County, Arizona, and was thereafter on the 4th day of October, 1901, released and discharged of record by the mortgagee Anthony G. Hubbard.

4.

That at various times between March 20th, 1897, and May 23, 1903, the said Jesse Hoyt Smith, under the terms of the aforesaid

contract, advanced the further sum of $32,473.35, and that one-third part of such payments and advances so made by the said Jesse Hoyt Smith, together with interest from the date of such several payments and advances, at the rate of 6 per cent per annum, amounts to the sum of $21,772.17, which said sum was due to said Jesse Hoyt Smith from the said William J. Rainey under the terms of said contract, on May 23, 1903.

That since the 23rd day of May, 1903, and prior to the
28 28th day of November, 1903, the said Jesse Hoyt Smith advanced the further sum of $1085, one-third part thereof, together with interest thereon from said 28th day of November, 1903, was on the trial of this action due from the said William J. Rainey to the said Jesse Hoyt Smith; and that the total amount due at the date hereof, from the said William J. Rainey to the said Jesse Hoyt Smith, for principal and interest for such advances, under the terms of said contract, is the sum of Twenty-eight Thousand Two Hundred and Twenty-four and 02-100 Dollars. That no part thereof has been paid to the said plaintiff Jesse Hoyt Smith.

5.

That the said Jesse Hoyt Smith has complied with and fulfilled all of the terms and conditions of said contract on his part to be performed, and that the said William J. Rainey has failed and neglected to perform and carry out the terms and conditions of the said contract on his part to be performed and carried out.

6.

That on June 11th, 1902, the record title to an undivided one-third interest in and to Section twenty-two, Township Two North of Range Three East of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona (except the northwest quarter of the northwest quarter of said section), was in said William J. Rainey by virtue of the deed from the Arizona Land and Stock Com-
29 pany to said Jesse Hoyt Smith and William J. Rainey above mentioned, and that on said last mentioned date the said defendants John Luke and Frank Luke commenced an action in this Court against the said William J. Rainey to recover the sum of twenty-five hundred (2500) dollars, with interest thereon from April 1st, 1902, and that in said action the plaintiffs therein sued out of this Court a writ of attachment for the said sum of $2500 and interest as aforesaid against the property of the said William J. Rainey to secure the said sum of $2500 and interest aforesaid and caused the same to be delivered to the Sheriff of Maricopa County, Arizona, for service. That on the said 11th day of June, 1902, the said Sheriff of Maricopa County, by virtue of the said writ of attachment, duly seized and levied the said writ of attachment upon, and attached all the right, title and interest of the said William J. Rainey in and to the above described premises, and on said day filed a copy of said writ of attachment, together with a description of the property attached, with the County Recorder of Maricopa

County, and the same was on said day duly filed by him and recorded in said Recorder's office in a book kept by him for that purpose.

That thereafter such proceedings were had in said cause that on the 11th day of June, 1903, the said Frank Luke and John Luke recovered a judgment against the said William J. Rainey for the sum of $2500 with interest thereon at the rate of 6 per cent per annum from April 1st, 1902, together with the costs of said
30 action, and which judgment foreclosed the lien of said attachment upon the premises hereinbefore described as the same existed on June 11th, 1902, and ordered and directed that same be sold as under execution to satisfy said judgment.

That on the 6th day of August, 1903, an order of sale was duly issued out of this Court in said cause directed to the Sheriff of Maricopa County, Arizona, commanding him to seize and sell as under execution the premises and property hereinbefore mentioned to satisfy said judgment, and that by virtue thereof, the said Sheriff did seize the said premises and property, and pursuant to a notice duly published and posted as required by law, did, on the 8th day of September, 1903, sell the said premises and property at public auction to the highest and best bidder, and that the defendants Frank Luke and John Luke were the purchasers at said sale, and did purchase the said premises at said sale for the sum of twenty-nine hundred dollars and seventy-six cents ($2900.76), the said amount being the full amount of said judgment and costs, and that thereupon the said Sheriff executed and delivered to said defendants Frank Luke and John Luke the usual certificate of purchase of said premises, and that thereafter on the 29th day of December, 1903, the said Sheriff returned the said execution and order of sale unto the office of the Clerk of this Court, showing the said judgment and said execution and order of sale to be fully satisfied and discharged by the sale of said premises. That thereafter on the 20th day of June, 1904, no redemption of said premises from
31 said sale had been made, and that on the said last mentioned date the Sheriff of Maricopa County, Arizona, executed, acknowledged and delivered to the said Frank Luke and John Luke a Sheriff's Deed to said premises.

7.

That the said contract attached to the said second amended complaint, as Exhibit A thereof, has never been filed for record in the Recorder's Office of Maricopa County, Arizona, and that the said defendants Frank Luke and John Luke had not nor had either of them any knowledge or notice of the existence of said contract at any time prior to the filing of the plaintiff's second amended complaint herein, to which a copy of said contract is attached as Exhibit A, on December 31, 1903, saving and excepting such notice actual or constructive as was imparted to them by the pleadings in this cause, or which the law imputed to them from such pleadings.

Conclusions of Law.

As Conclusions of Law from the above facts the Court finds:

1.

That the plaintiff Jesse Hoyt Smith is entitled to a judgment against the defendant William J. Rainey for the sum of Twenty-eight Thousand Two Hundred and Twenty-four and 02-100
32 Dollars, with interest thereon at the rate of 6 per cent per annum from this date, until paid.

2.

That the contract, a copy of which is attached to the plaintiff's second amended complaint herein, constituted the said Jesse Hoyt Smith and the said William J. Rainey co-partners in respect to the property described in plaintiff's complaint, and thereby constituted the said William J. Rainey a trustee in favor of the said Jesse Hoyt Smith in respect to the undivided one-third interest in the premises described in the plaintiff's complaint, and which were conveyed by the Arizona Land and Stock Company to the said William J. Rainey, and that by virtue thereof the said Jesse Hoyt Smith has a lien upon said undivided one-third interest in and to said premises so conveyed to the said William J. Rainey for the payment of the said sum of $— found due from the said William J. Rainey to the said Jesse Hoyt Smith as aforesaid.

3.

That the said mortgage executed by the said William J. Rainey to said Anthony G. Hubbard, bearing date the 28th day of November, 1898, securing the payment of a promissory note executed by the said Rainey to the said Hubbard for the said sum of $3000, of even date with said mortgage, with interest thereon at the
33 rate of 8½ per cent per annum, on the property mentioned in said mortgage, does not in any manner affect the right of the plaintiff Jesse Hoyt Smith to a lien on said Rainey's interest in said property for the amount found due from said Rainey to said Smith as aforesaid.

4.

That by the filing and service upon them of the original complaint in this action, the said defendants Frank Luke and John Luke are in law charged with constructive notice of all of the provisions of the contract in writing between the said Jesse Hoyt Smith and the defendant William J. Rainey, a copy of which is attached to the second amended complaint herein, and sufficient reference to which and of the contents of the same was made and set forth in the original complaint herein; and that by reason thereof the said defendants Frank Luke and John Luke were in law charged

with notice of all of the provisions of said contract, prior to the purchase by them of the one-third interest of the defendant William J. Rainey in the premises described in the plaintiff's complaint herein, at the Sheriff's sale thereof, under the execution and order of sale issued out of this Court in Case Number 3958, being the case of Frank Luke and John Luke vs. William J. Rainey, hereinbefore mentioned.

5.

That the lien of the plaintiff Jesse Hoyt Smith on the
34 undivided one-third interest in the premises mentioned in the plaintiff's complaint and conveyed to the said defendant Rainey by the deed of the Arizona Land and Stock Company hereinbefore mentioned, is prior and superior to the lien and interest therein acquired by the said defendants Frank Luke and John Luke by virtue of the attachment, judgment and Sheriff's sale of said premises to them, in the case of Frank Luke and John Luke against William J. Rainey, hereinabove mentioned.

6.

That the plaintiff is entitled to the judgment of this Court against the said defendant William J. Rainey for the sum of Twenty-eight Thousand Two Hundred and Twenty-four and 02-100 ($28,224.02) Dollars, together with interest thereon from the date hereof at the rate of 6 per cent per annum until paid, together with his costs and disbursements incurred herein, and that the said amount be adjudged a lien upon the undivided one-third interest of the said William J. Rainey in and to the premises described in the complaint herein, as the same existed on the 20th day of March, 1897, together with a foreclosure of said lien, and that an order of sale issue by the Clerk of this Court to the Sheriff or any constable of Maricopa County, Arizona, commanding him to seize and sell the said property, as in case of execution in satisfaction of the same.

Let the judgment be entered accordingly.
35 Dated Phœnix, Arizona, March 27th, 1909.

EDWARD KENT, *Judge.*

Filed April 16th, 1909.

Judgment.

[Title of Court and Cause.]

The above entitled action having duly come for trial on the 11th day of February, 1909, before the above Court sitting without a jury, the Hon. Edward Kent presiding, the plaintiff appearing by C. F. Ainsworth, his attorney, and the defendants William J. Rainey and Lillian Rainey having been duly served with process and having appeared and answered by their attorneys, Chalmers & Wilkinson, and the defendants Frank Luke and John Luke appear-

ing by their attorney, Walter Bennett, and the parties having submitted to this Court their evidence and testimony herein, and the Court, after being fully advised in the premises, having on the 27th day of March, 1909, duly made and filed herein its findings of fact and conclusions.

Now, therefore, on motion of the plaintiff's attorney,

It is by the court ordered, adjudged and decreed, that the plaintiff Jesse Hoyt Smith have and recover of and from the defendant William J. Rainey the sum of Twenty-eight Thousand Two Hundred and Twenty-four and 02-100 ($28,224.02) Dollars,

36 with interest thereon at the rate of six per cent per annum from this date, together with his costs and disbursements herein, taxed at the sum of $—.

It is further ordered and adjudged, that the said plaintiff herein has a superior and prior lien on the undivided one-third interest in and to the property described in the complaint herein, heretofore owned by the said William J. Rainey, and the legal title to which is now held by the said defendants Frank Luke and John Luke, to the extent of the aforesaid amounts herein adjudged to be due him from the said defendant William J. Rainey, and that the said lien be and the same is hereby foreclosed, and that an order of sale issue out of this Court to the Sheriff or any constable of the County of Maricopa directing him to seize and sell the same as under execution, in satisfaction of the said judgment; and if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid out of any other property of the defendant William J. Rainey, as in the case of ordinary executions; that out of the proceeds derived from the sale of the aforesaid property one-third interest of the said defendants William J. Rainey and John Luke and Frank Luke, in and to the property hereinbefore described, the plaintiff herein be paid the amount herein found due him, together with accruing costs and costs of sale, and to pay the balance thereof to the defendants John Luke and Frank Luke.

37 It is further ordered and adjudged, that on the sale of said property aforesaid the defendants and each of them and all persons claiming under them or any of them, be and they are hereby forever barred and estopped from claiming any right, title, interest or equity in and to the said property or any part thereof, except the equity and right of redemption as provided by law.

Done in open Court this 27th day of March, 1909.

EDWARD KENT, *Judge.*

Filed April 16th, 1909.

Amended Motion for New Trial.

Come now the defendants Frank Luke and John Luke and move the Court to set aside the decision and judgment of the Court in this cause, and to grant these defendants a new trial herein upon the following grounds:

I.

The Court erred in admitting improper and incompetent evidence offered by the plaintiff and objected to by these defendants.

II.

The Court erred in refusing to admit proper and competent evidence offered by these defendants.

38

III.

The Court erred in its conclusion of law No. 2 by declaring that the contract therein referred to constitutes William J. Rainey a trustee in favor of Jesse Hoyt Smith in respect to the undivided one-third interest in the premises described in plaintiff's complaint conveyed by the Arizona Land and Stock Company to said William J. Rainey.

IV.

The Court erred in its conclusion of law No. 4 as follows, viz:

"That by the filing and service upon them of the original complaint in this action, the said defendants Frank Luke and John Luke, are in law charged with constructive notice of all the provisions of the contract in writing between the said Jesse Hoyt Smith and the defendant William J. Rainey, a copy of which is attached to the second amended complaint herein, and sufficient reference to which and of the contents of the same was made and set forth in the original complaint herein; and that by reason thereof the said defendants Frank Luke and John Luke were in law charged with notice of all of the provisions of said contract, prior to the purchase by them of the one third interest of the defendant William J. Rainey in the premises described in the plaintiff's complaint herein. at the Sheriff's sale thereof, under the execution and order of

39 sale issued out of this court in case number 3958, being the case of Frank Luke and John Luke vs. William J. Rainey hereinbefore mentioned."

V.

The court erred in its conclusion of law No. 5 as follows, viz:

"That the lien of the plaintiff Jesse Hoyt Smith on the undivided one third interest in the premises mentioned in the plaintiff's complaint and conveyed to the said defendant Rainey by the deed of the Arizona Land and Stock Company hereinbefore mentioned, is prior and superior to the lien and interest therein acquired by the said defendants Frank Luke and John Luke by virtue of the attachment, judgment and Sheriff's sale of said premises to them, in the case of Frank Luke and John Luke against William J. Rainey hereinabove mentioned."

VI.

The findings of fact are contrary to the evidence in the case.

VII.

The conclusions of law are not warranted by the facts found by the Court, or by the evidence in the case.

VIII.

The judgment of the Court is not supported by the find-
40 ings of fact or by the facts proven by the evidence in the case.

IX.

The judgment of the Court is contrary to the law and the evidence.

WALTER BENNETT,
Attorney for Defendants Frank Luke and John Luke.

Minute Entries.

[Title of Court and Cause.]

Be it remembered, that heretofore and on, to-wit, the 4th day of December, A. D. 1908, the same being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was had and entered of record in said Court in the above-entitled cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH, Plaintiff,
vs.
WM. J. RAINEY et al., Defendant-.

At this day, pursuant to the mandate from the Supreme Court, it is ordered by the Court that the demurrer of the defendant- Luke herein be overruled.

And afterwards and upon, to-wit, the 5th day of Decem-
41 ber, A. D. 1908, the same being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in the said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH, Plaintiff,
vs.
WM. J. RAINEY et al., Defendant-.

At this day upon motion of the plaintiff herein, it is ordered by the Court that this case be set for trial January 2nd, proximo.

And afterwards and upon, to-wit, the 16th day of December, A. D. 1908, the same being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day, by consent, it is ordered by the Court that this case be reset for trial February 5th, A. D. 1909.

And afterwards and upon, to-wit, the 4th day of February, A. D. 1909, the time being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter
42 alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day on motion of C. F. Ainsworth, Esq., attorney for the said plaintiff, it is ordered by the Court that L. M. Ogden, Esq., an attorney from the Bar of the Supreme Court of Wisconsin, be allowed to appear in this case for the plaintiff.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day this matter coming on to be heard on the general and special demurrer of the defendants Luke in the amended answer to the amended complaint, the said defendants not pressing their demurrer, it is ordered by the Court that the same be and hereby is overruled.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

43 4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day comes the said plaintiff in his own proper person and by C. F. Ainsworth, Esq., and L. M. Ogden, Esq., his attorneys, and the defendants Frank Luke and John Luke also come in their own proper persons and by Walter Bennett, Esq., their attorney, and thereupon this cause coming on for trial before the Court without a jury on the issues herein joined, comes the evidence both oral and documentary on the part of the plaintiff and defendants, after which the case is argued to the Court by counsel and submitted to the Court for its further consideration.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day it is ordered by the Court that Exhibit "B" be withdrawn after having been compared by the defendants herein.

And afterwards and upon, to-wit, the 27th day of March, A. D. 1909, the same being one of the regular judicial days of the
44 October Term, A. D. 1908, of the said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

This cause having been heretofore tried, argued and submitted to the Court for its further consideration, and the Court having considered the same and being now sufficiently advised in the premises, and the parties being now present in Court by their at-

torneys, doth find that plaintiff is entitled to judgment as prayed for in his complaint, together with the foreclosure of his lien.

And it is ordered that a judgment be prepared in accordance with such findings, which when signed by the Court, shall be entered in the judgment book.

And afterwards and upon, to-wit, the 3rd day of April, A. D. 1909, the same being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day by consent it is ordered that defendants' mo-
45 tion for a new trial of this cause be reset for hearing April 10th inst.

And afterwards and upon, to-wit, the 10th day of April, A. D. 1909, the same being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day by consent it is ordered that the motion of the defendants Luke for a new trial of this cause be reset for hearing April 17th inst.

And afterwards and upon, to-wit, the 17th day of April, A. D. 1909, the same being one of the regular judicial days of the October Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day by consent it is ordered by the Court that the motion of the defendants Luke for a new trial herein, be resert for hearing

April 24th inst., and for good cause to the Court appearing
46 be continued until the next term of this Court provided by law.

And afterwards and upon, to-wit, the 24th day of April, A. D. 1909, the same being one of the regular judicial days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day this matter coming on to be heard on the motion of the defendants Luke to set aside the judgment herein and for a new trial in this behalf, is argued by counsel and is submitted to the Court for its further consideration.

And afterwards and upon, to-wit, the 15th day of May, A. D. 1909, the same being one of the regular judicial days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. FINEY et al.

This matter having been heretofore submitted to the Court
47 on motion of the defendants Luke to set aside the judgment and for a new trial in this behalf, and by the Court taken under advisement, and having considered the same, and being now fully advised in the premises, the Court doth deny said motion, to which ruling the said defendants then and there duly except.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day come the said defendants Luke by their attorney and in open Court give notice of an appeal to the Supreme Court of

Arizona from the judgment rendered against them herein and the order denying their motion for a new trial.

And afterwards and upon, to-wit, the 22nd day of May, A. D. 1909, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

48 At this day comes the said plaintiff by C. F. Ainsworth, Esq., his attorney, and the defendants Frank Luke and John Luke by Messrs. Kibbey, Bennett & Bennett, their attorneys, also come, and thereupon, upon motion of the said defendants Luke and Luke, of the hearing whereof due notice has been given to the said plaintiff, and upon due consideration the Court fixes the amount of the bond to be executed by the said Lukes upon their appeal to the Supreme Court of the Territory of Arizona from the judgment of this Court against them, to stay the execution thereof against them as to the sale of the lands ordered to be sold, at Seven Thousand Dollars ($7000).

And afterwards and upon, to-wit, the 24th day of May, A. D. 1909, there was filed in the Clerk's office of said Court in said cause, an appeal and supersedeas bond, which said appeal and supersedeas bond, with the endorsements thereon, is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

JESSE HOYT SMITH, Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE and JOHN LUKE, Defendants.

49 Know All Men by These Presents, That we, Frank Luke and John Luke, as principals, and P. T. Hurley, J. W. Walker, Edward Eisele and Joseph Thalheimer as sureties, are held and firmly bound unto Jesse Hoyt Smith in the penal sum of Seven Thousand ($7,000.00) Dollars lawful money of the United States, for which sum well and truly to be paid unto the said Jesse Hoyt Smith, we bind ourselves, our heirs, executors, administrators and assigns jointly, severally and firmly by these presents.

Sealed with our seals and dated this 22nd day of May, 1909.

The conditions of this obligation are such that, whereas, on the 27th day of March, 1909, the said Jesse Hoyt Smith, in a certain cause then pending in the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, wherein said Jesse Hoyt Smith was plaintiff and William J. Rainey, Lillian Rainey, Frank Luke and John Luke were defendants, did recover a judgment against said William J. Rainey for the sum of Twenty-eight thousand two hundred twenty-four 02-100 dollars ($28,224.02) with interest thereon at the rate of six per cent per annum, together with the costs of said action taxed at Thirty-three and 90-100 Dollars, and which said judgment is thereby declared to be a prior and superior lien upon the undivided one-third interest in and to the following described premises, viz.:

Section twenty-two (22), Township Two (2) North, Range Three East of the Gila and Salt River Base and Meridian (excepting therefrom the northwest quarter (¼) of the northwest quarter (¼) of said section). Together with seven and one-half (7½) water rights in the Arizona Canal numbering from one hundred and one (101) to one hundred and eight (108) inclusive, deeded and affixed to said premises, the legal title to which is held by the said Frank Luke and John Luke, and which said judgment directs that an order of sale issue out of said Court to the sheriff or any constable of said Maricopa County, directing him to seize and sell said premises as under execution in satisfaction of said judgment, and

Whereas, the said Frank Luke and John Luke have appealed from said judgment to the Supreme Court of the Territory of Arizona, and desire to stay the sale of said premises under such order of sale, in satisfaction of said judgment, pending said appeal.

Now therefor-, if the said Frank Luke and John Luke shall prosecute their said appeal to effect and in case the judgment of the Appellate Court shall be against *him*, shall pay to the said Jesse Hoyt Smith all damages which he may sustain by the staying of the sale of said premises under such order of sale, in satisfaction of said judgment pending said appeal, and all costs which shall be adjudged against him on such appeal, then this obligation to be void, otherwise to remain in full force and effect.

FRANK LUKE.
JOHN LUKE.
P. T. HURLEY.
J. W. WALKER.
EDWARD EISELE.
JOSEPH THALHEIMER.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Before me, Ethel Whitlow, a Notary Public, in and for said County, in said Territory, personally came, this 22nd day of May, 1909, P. T. Hurley, J. W. Walker, Edward Eisele and Joseph Thalheimer, sureties on the foregoing appeal bond, and being duly sworn, each for himself and not one for the other, says that he is

worth Seven Thousand ($7,000.00) Dollars over and above his just debts and liabilities, exclusive of property exempt from execution.

P. T. HURLEY.
J. W. WALKER.
EDWARD EISELE.
JOSEPH THALHEIMER.

Subscribed and sworn to before me by each of said affiants, severally, this 22nd day of May, 1909.

Witness my hand and official seal.

[NOTARIAL SEAL.] ETHEL WHITLOW,
Notary Public.

My commission expires February 6th, 1913.

Approved:

EDWARD KENT,
Chief Justice.

52 Endorsements: No. 4129. In the District Court of Maricopa County, Territory of Arizona. Jesse Hoyt Smith, Plaintiff, vs. William Rainey et al., Defendants, Appeal and Supersedeas Bond. Filed May 24, 1909. Elias F. Dunlevy, Clerk. Kibbey, Bennett & Bennett, Attorneys for Defendants Frank Luke and John Luke, Fleming Block, Phœnix, Arizona.

And afterwards and upon, to-wit, the 28th day of May, A. D. 1909, there was filed in the Clerk's office of said Court in said cause, an appeal bond, which said appeal bond, with the endorsements thereon, is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JESSE HOYT SMITH Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE and JOHN LUKE, Defendants.

Know All Men by These Present, That we, Frank Luke and John Luke, as principals, and D. C. Babbitt and Wm. E. Thomas,
53 as sureties, are held and firmly bound unto Jesse Hoyt Smith in the penal sum of Three Hundred ($300.00) Dollars lawful money of the United States for which sum well and truly to be paid unto the said Jesse Hoyt Smith, we bind ourselves, our heirs, executors, administrators and assigns, jointly, severally and firmly by these presents.

Sealed with our seals and dated this 24th day of May, 1909.

The conditions of this obligation are such that, whereas, on the 27th day of March, 1909, the said Jesse Hoyt Smith, in a certain cause then pending in the District Court of the Third Judicial

District of the Territory of Arizona, in and for the County of Maricopa, wherein said Jesse Hoyt Smith was plaintiff and William J. Rainey, Lillian Rainey, Frank Luke and John Luke were defendants, did recover a judgment against said William J. Rainey for the sum of $28,224.02, with interest thereon at the rate of six per cent per annum, together with the costs of said action taxed at — Dollars, and which said judgment is thereby declared to be a prior and superior lien upon the undivided one-third interest in and to the following described premises, viz:

Section twenty-two (22), Township Two (2) North, Range Three East of the Gila and Salt River Base and Meridian (excepting therefrom the northwest quarter (¼) of the northwest quarter (¼) of said section). Together with seven and one-half (7½) water
54 rights in the Arizona Canal, numbered from one hundred and one (101) to one hundred and eight (108) inclusive, deeded and affixed to said premises, the legal title to which is held by the said Frank Luke and John Luke, and which said judgment directs that an order of sale issue out of said Court to the Sheriff or any constable of said Maricopa County, directing him to seize and sell said premises as under execution in satisfaction of said judgment, and

Whereas, the said Frank Luke and John Luke have appealed from said judgment to the Supreme Court of the Territory of Arizona, and the Clerk of the District Court of said Maricopa County, Arizona, has fixed the sum of Three Hundred ($300.00) Dollars as being double the probable amount of the costs of suit in the Appellate Court and said District Court.

Now therefore, if the said Frank Luke and John Luke shall prosecute their said appeal with effect and shall pay all costs which have accrued in said District Court, or which may accrue in said Supreme Court in said cause, then this obligation to be void, otherwise to remain in full force and effect.

FRANK LUKE.
JOHN LUKE.
D. C. BABBITT.
WM. E. THOMAS.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Before me, George Kirkland, Probate Clerk in and for said
55 County, in said Territory, personally came this twenty-eighth day of May, 1909. D. C. Babbitt, Wm. E. Thomas, sureties on the foregoing appeal bond, and being duly sworn, each for himself and not one for the other, says that he is worth Three Hundred ($300.00) Dollars over and above his just debts and liabilities exclusive of property exempt from execution.

D. C. BABBITT.
WM. E. THOMAS.

Subscribed and sworn to before me by each of said affiants, severally, this 28th day of May, 1909.

Witness my hand and official seal.

[Probate Court Seal.] GEO. KIRKLAND,
Clerk of the Probate Court,
Maricopa County, Arizona.

Endorsements: No. 4129. In the District Court of Maricopa County, Territory of Arizona. Jesse Hoyt Smith, Plaintiff, vs. William J. Rainey et al., Defendants. Appeal Bond. Approved and filed May 28th, 1909. Elias F. Dunlevy, Clerk. Frank B. Cook, Deputy Clerk. Kibbey, Bennett & Bennett, Attorneys for Defendants Frank Luke and John Luke, Fleming Block, Phœnix, Arizona.

56 And afterwards and upon, to-wit, the 28th day of May, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE.

Comes now the plaintiff by Mr. Charles F. Ainsworth, his attorney; come the defendants Frank Luke and John Luke, by Messrs. Kibbey, Bennett & Bennett, their attorneys.

Therefore said defendants Luke present their motion heretofore filed herein for an order directing the Sheriff of this County to return the order of sale heretofore issued in this cause by the Clerk of the Court, and to quash the same, and that the plaintiff be restrained from further proceedings by way of execution of said order of sale entered in this cause.

It being made to appear to the Court that said order of sale so issued as aforesaid had been returned by said Sheriff unto the office of said Clerk since the filing of this motion, and it further appearing that said defendants Frank Luke and John Luke have heretofore executed and filed their bond to stay proceedings herein
57 * as prescribed by law and the order of this Court heretofore made on the premises, and that said bond has been duly approved by this Court, and the Court being sufficiently advised,

It is now ordered that said plaintiff herein refrain from any proceedings to enforce the order of sale made in this cause, and that all proceedings for the execution thereof shall be stayed until the final disposition of the appeal taken by said Frank Luke and John Luke therefrom to the Supreme Court of this Territory.

(Signed) EDWARD KENT.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

I, Elias F. Dunlevy, Clerk of the District Court of the Third Judicial District of the Territory of Arizona, in and for said County, do hereby certify that the above and foregoing contains a true copy of all minutes entries made in the above entitled cause and of the appeal and supersedeas bond and the appeal bond, and that the papers transmitted herewith are all the papers constituting the record of the case except defendants' Exhibit I (the judgment roll of said Court in Case 3958), a copy of the material portions whereof is transmitted herewith in lieu thereof.

Witness my hand and the seal of said Court this 23rd day of June, A. D. 1909.

[SEAL.]

ELIAS F. DUNLEVY,
Clerk of said District Court.

58 Copies of the following designated papers which are contained in the Abstract of Record are omitted from the Transcript on Appeal by direction of attorneys for Appellants:

Reporter's Transcript of Evidence, Exhibit "D" (being Direct and Cross Interrogatories to be propounded to Witness J. W. Dadman and Answers thereto), Exhibit "E" (being Direct and Cross Interrogatories to be propounded to William J. Rainey and Answers thereto), Memorandum regarding Plaintiff's Exhibits, Exhibit "C" (being a Warranty Deed) and Statement regarding Defendants' Exhibits omitted from the Abstract of Record.

59 And on to-wit: the 10th day of January, 1910, being one of the regular juridical days of the January Term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. Walter Bennett for appellants, it is ordered by the Court that one and one-half hours be granted for oral argument in this cause and the hearing set for January 15th, 1910.

And on to-wit: the 15th day of January, 1910, being one of the regular juridical days of the January Term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

On motion of Mr. C. F. Ainsworth, it is ordered by the Court that Mr. Lewis M. Ogden be admitted for the purpose of argument in this cause.

On motion of Mr. Lewis M. Ogden, it is ordered by the Court

that he be granted leave to file supplemental brief on behalf of appellee.

60 It is further ordered that attorneys for appellants be granted leave to file reply brief.

And on the same day to-wit: the 15th day of January, 1910, being one of the regular juridical days of the January Term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for hearing was argued by Mr. Walter Bennett for appellants, and Mr. Lewis M. Ogden and Mr. C. F. Ainsworth for appellee, and cause ordered submitted.

And on to-wit: the 17th day of January, 1910, being one of the regular juridical days of the January Term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

On motion of Mr. Walter Bennett, attorney for appellants herein, it is ordered by the Court that he be granted leave to make corrections in appellants brief.

61 And on to-wit: the 2nd day of April, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1123.

FRANK LUKE and JOHN LUKE, Appellants,
vs.
JESSE HOYT SMITH, Appellee.

Appeal from the District Court of Maricopa County; Before Honorable Edward Kent, Judge.

Messrs. Kibbey, Bennett & Bennett, for Appellants.
Mr. C. F. Ainsworth, for Appellee; Mr. Lewis M. Ogden, of counsel.

Opinion, by Campbell, J.

The second amended complaint in this action was before us in Smith v. Rainey, et al., 9 Ariz., 362, 83 Pac., 463, and was held by us not to state a cause of action. Upon appeal to the Supreme Court of the United States, that court held that the agreement between

Smith and Rainey constituted them partners, and gave to Smith a partners' lien upon the land, as a partnership asset; reversed the judgment of this court and remanded it for trial. 209 U. S., 53.

The opinions above indicated set forth the sub-
62 stance of the complaint and of the agreement attached to it. By their answer, the defendants Luke allege that on June 11, 1902, Rainey was the owner of and held in his own name the title of record to and was in possession of an undivided one-third interest in the land described in the complaint; that on that day Rainey, being indebted to the Lukes in the sum of $2,500, with interest, they commenced an action to recover the said sum and interest and sued out an attachment which was duly served and levied upon Rainey's interest in said land, and thereafter duly recorded in the office of the county recorder of Maricopa County; that thereafter, such proceedings were had in the cause that on June 11, 1903, the Lukes recovered a judgment against Rainey for the amount of his indebtedness to them, and which judgment foreclosed the lien of attachment; that on the 6th day of August, 1903, an order of sale was duly issued out of the court, and that on the 8th day of September, 1903, the premises were sold to the Lukes, who, after the expiration of the period of redemption, received a deed therefor from the sheriff. It is further alleged that neither of the Lukes had any knowledge or any notice, actual or constructive, of the existence of the agreement attached to the complaint of the plaintiff, prior to the filing of plaintiff's second amended complaint, which said second amended complaint was filed on the 31st day of December, 1903.

63 The action was tried by the court without a jury, and resulted in a judgment for Smith. The trial court found that the land described in the complaint was purchased by Smith and Rainey in March, 1897, for the sum of $18,000.; that Smith advanced and paid the purchase price; that the title to the land was taken, an undivided two-thirds in the name of Smith and an undivided one-third in the name of Rainey; that at various times between March 20, 1897, and May 23, 1903, Smith, under the terms of the contract attached to the complaint, advanced the further sum of $32,473.35, and that one-third of such payments and advances so made by Smith, together with interest, amounts to the sum of $21,722.17, which said sum was due to Smith from Rainey, under the terms of the contract, on May 23, 1903; that since May 23, 1903, and prior to the 28th day of November, 1903, Smith advanced the further sum of $1,085, and that the total amount due at the time of the trial of the action, from Rainey to Smith, for principal and interest for such advances, under the terms of the contract, is the sum of $23,224.02. The trial court further found the allegations of the answer of the defendants Luke to be true, with the exception of the matter of notice.

As conclusions of law, the court found that Smith is entitled to a judgment against Rainey for the amount due from him to
64 Smith; that the contract, a copy of which is attached to the complaint, constituted Smith and Rainey copartners in re-

spect to the property described in the complaint, and thereby constituted Rainey a trustee in favor of Smith, with respect to the undivided one-third interest in the premises standing in his name; and that by virtue thereof, Smith has a lien upon said land for the payment of the amount found due him from Rainey.

There is another conclusion of law drawn by the court, to which we will hereafter call attention. Judgment was in favor of Smith, against Rainey, in the sum of $28,224.02, and the lien of Smith was adjudged prior in right to that of the defendants Luke. From this judgment the defendants Luke have appealed.

At the common law, the purchaser at an ordinary execution sale takes subject to all outstanding equities of which he had notice at the time of the sale, and this must be considered the rule in this Territory, except as it may have been changed by statute. Therefore, the first question to be considered is the effect to be given our recording statute, Paragraph 749, R. S. 1901, which provides:

"All bargains, sales and other conveyances whatever, of any lands, tenements and hereditaments, whether they may be made for passing any estate of freehold or inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged and filed with
65 the recorder, to be recorded, as required by law, or, where record is not required deposited and filed with the recorder; but the same, as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof, or without valuable consideration, shall nevertheless be valid and binding."

Counsel agree that the statute was adopted from the laws of Texas by the legislature of this Territory. The Supreme Court of that state, while uniformly holding that a prior unrecorded conveyance or mortgage creates no rights as against creditors who have obtained liens, had, prior to our adoption of the statute, construed it as not affecting resulting trusts or equitable liens evidence of which is not required or permitted to be recorded. Thus, in Blankenship v. Douglas, 26 Tex., 226, it is said:

"It seems to be well settled that a judgment lien on the land of a debtor is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment. And courts of equity, it is said * * * will limit that lien to the actual interest which the judgment debtor has in the estate. * * * If the property in controversy was purchased by John J. Blankenship with the funds of David Blankenship, and for him, then the equitable estate in the land was in said Blankenship, and upon proof of the facts, the land might have been sold under execution for the debts of David Blankenship. * * * This kind of an equity is beyond the contemplation of our statute of registration respecting the rights of creditors."

In Senter v. Lambeth, 59 Tex., 259, the controversy was between an attaching creditor who was without notice at the time his

attachment was levied and at the time when judgment was
66 rendered, but who had notice at the time he purchased at his own execution sale, and the claimant of a vendor's lien. The question involved is thus stated by the court:

"The sole question in the case is whether, under the admitted facts, the lien and rights acquired by virtue of the writ of attachment, judgment and sheriff's sale are superior to those of the appellees, who hold the unrecorded vendor's lien, of which appellants had notice at or before the sale, but of which no notice was had when the writ of attachment was levied or when the judgment was obtained."

The previous decisions of the court are examined, and it is held (quoting from the syllabus, which correctly states the ruling of the court):

"As against a purchaser with notice of a vendor's lien before sale under a judgment which judgment constituted a legal lien on land, a court of equity will confine the operation of the legal lien of the judgment creditor to the actual interest which the judgment debtor had in the estate at the time such legal lien was fixed. The vendor's lien will be protected, though the purchaser, who had notice before his purchase of execution sale, had no actual notice when the judgment lien attached."

Again, in Calvert v. Roche, 59 Tex., 463, it is said:

"As a general proposition, a judgment lien only attaches to the actual interest of the debtor in the land; but on account of our registration laws, ordinarily, if the judgment lien attaches before the creditor has notice of the existence of the unrecorded deed, then such deed is subordinated to the lien, and subsequent notice of the existence of the deed would work no change in the rights of the parties. But when the debtor holds the legal title in trust for others, with whose funds and for whose use it was purchased, then if the purchaser at sheriff's sale made by virtue of such judgment,
has notice of the rights of the cestui que trusts before his
67 purchase, he would acquire no title to the property as against them. This distinction results from the fact that such an equitable right is not subject to or governed by the registration statutes."

This doctrine has repeatedly been affirmed, and as late as Paris v. Burks, 105 S. W., 174, it is said:

"It is true that the statute operates only against claims dependent on instruments which are required or permitted to be recorded, and rights to which the law gives rise in certain states of fact and of which it requires no evidence upon the records or in writing, such as vendors' liens, certain kinds of trusts, and, perhaps, others that might be instanced, are not postponed to the rights of creditors resulting from the mere acquisition of liens by legal process."

We perceive no difference in principle between the equitable rights involved in and protected by the decisions of the Supreme Court of Texas, and the equitable rights of a partner to a lien for money advanced for the purchase and improvement of lands used in carrying out the joint venture. We feel constrained to follow the construction given the statute by the Supreme Court of Texas prior to our

adoption of it, and to hold that Smith's lien is prior to that of the Lukes, and must prevail over it, if they had notice, actual or constructive, of such lien at the time of the sale.

The trial court found that the Lukes, at the time of the sale, had no actual notice, but that they did have constructive notice of Smith's lien. The original complaint in this action was filed July
18, 1903. The sale under the Lukes' judgment occurred Sep-
68 tember 8, 1903; and on December 31, 1903, this second amended complaint was filed. To the second amended complaint, for the first time, was attached a copy of the agreement between Smith and Rainey, and it will be observed that this complaint was filed subsequent to the sale. The original complaint did not set forth sufficient facts to show that Smith was entitled to a partnership lien. It purported to state the substance of a portion of the agreement between Smith and Rainey, and disclosed that the basis of whatever rights Smith had was evidenced by a written contract, and that by reason of that contract, and operations under it he claimed a lien upon the land. Did this pleading convey to the Lukes sufficient information to put them upon inquiry as to Smith's rights, and charge them with constructive notice of the existence of his lien, prior to the sale? There is not so much difficulty in stating the rule as in applying it to a given state of facts. Where one has notice of a fact affecting property which he seeks to purchase, which puts him upon inquiry, he is chargeable with the knowledge which the inquiry, if made, would have revealed; and one is put upon inquiry by notice of a claim which is inconsistent with the title he seeks to obtain, and must exercise due diligence to ascertain the facts upon which the claim is based. In Fidelity Company v. Rail-
road Co., 32 W. Va., 244, it is said that
69 "Whatever is sufficient to put a person on inquiry is considered as conveying notice; for the law imputes a personal knowledge of a fact, of which the exercise of common prudence might have apprised him. When a subsequent purchaser has actual notice that the property in question is encumbered or affected, he is charged constructively with notice of all the facts and instruments, to the knowledge of which he would have been led by inquiry into the encumbrance or other circumstances affecting the property of which he had notice."

The Supreme Court of the United States, after quoting the foregoing, say:

"Vice Chancellor Wigram, in Jones v. Smith, supra, laid it down that cases in which constructive notice had been established, resolved themselves into two classes; first, those in which the party charged had actual notice that the property in dispute was in some way affected, and the court has thereupon bound him with constructive notice of facts to a knowledge of which he would have been led by an inquiry into the matters affecting the property, of which he had actual notice; and, secondly, those where the court has been satisfied that the party charged had designedly abstained from inquiry for the purpose of avoiding notice. If there is not actual notice that

the property is in some way affected so that the case does not fall within the first class, and no fraudulent turning away from a knowledge of facts which the res gestæ would suggest to a prudent mind, or gross and culpable negligence, so as to bring it within the second, then the doctrine of constructive notice would not apply."

The Supreme Court then adds:

"Each case must be governed by its own peculiar circumstances."

Simmons Creek Coal Co. v. Doran, 142 U. S., 417.

Applying these statements of the law to the facts of the present case, we think the trial court was right in holding that the
70 Lukes were put upon inquiry and by diligence could have ascertained before the sale the rights of Smith in the premises. The complaint advised them that Smith and Rainey had a contract in writing, which Smith claimed gave him a lien upon the land. While this pleading was technically deficient, it disclosed enough to cause a prudent man to inquire as to the full terms of this writing, before purchasing. It is suggested by the appellee that, as defendants in the action, the Lukes could, by application to the court under Paragraph 2555 of our statutes, have obtained a copy of the contract; but it is probable that had they requested of Smith or his counsel out of court a disclosure of the full terms of the contract, they would be protected. They made no inquiry, and we think that in failing to do so they were at fault and must be held chargeable with the knowledge they would have obtained had they made inquiry.

In 1898 Rainey executed a mortgage to one Hubbard upon the one-third undivided interest in the land standing in his name, warranting that his title thereto was free and unincumbered, which said mortgage was placed of record. Appellants contend that by participating and acquiescing in the placing of such title in Rainey of record, and with notice and without protest permitting Rainey to mortgage the property, and otherwise publicly treat it as his
71 own individual property, Smith waived all right to claim a lien upon said premises prior and superior to that of the attachment and judgment creditors of Rainey. There is no evidence, however, that Smith knew anything of this mortgage, and we do not think that the record operated as constructive notice to him.

Bates v. Norcross, 14 Pick., 224.
Maul v. Rider, 59 Pa. St., 167.
Building Ass'n v. Fellers, 96 Va., 337; 31 S. E., 505.
White v. McGregor, 92 Tex., 556; 50 S. W., 564.

It is further insisted that by reason of the failure to comply with the requirements of Paragraph 2703, R. S. 1901, the property standing in Rainey's name is to be treated, in favor of his creditors, as his property. We do not think the statute applicable. It relates to merchants and traders, and not to a joint venture in the purchase and improvement of real estate, such as the record discloses existed in this case.

We perceive no error in the record, and affirm the judgment of the district court.

JOHN H. CAMPBELL, *A. J.*

We concur:

FLETCHER M. DOAN, *A. J.*
ERNEST W. LEWIS, *A. J.*
EDWARD M. DOE, *A. J.*

72 And on the same day to-wit: the 2nd day of April, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1123.

FRANK LUKE and JOHN LUKE, Appellants,
vs.
JESSE HOYT SMITH, Appellee.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from Frank Luke and John Luke appellants herein, and P. T. Hurley, J. W. Walker, Edward Eisele and Joseph Thalheimer sureties on Supersedeas Bond herein, all damages which he may sustain by the staying of the sale of the property pending this appeal, and

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from Frank Luke and John Luke, appellants herein, and D. C. Babbitt and Wm. E. Thomas,
73 sureties on Cost Bond herein, his costs in this court, taxed at forty-one ($41.00) dollars, together with his costs in the court below in this cause incurred.

And on to-wit: the 15th day of April, 1910, came the appellants by their attorneys, and filed in the clerk's office of said court in said entitled cause their certain Motion for Rehearing, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

Motion for Re-hearing.

Comes now the defendants and appellants Frank Luke and John Luke, and move the court to grant the said appellants a re-hearing of said cause on the following grounds:

I.

The court failed to take note of the fact disclosed by the record and found by the trial court that the lien which the plaintiff
74 Smith is attempting to foreclose in this case was created by an instrument in writing, which, though unacknowledged, is entitled to be recorded under the decisions of this court.
95 Pac. 180.

It surely will not be contended that under the terms of the case above cited, the Recorder could refuse to record the contract in writing between Smith and Rainey. It was an instrument in writing creating a lien and therefore a mortgage. It is so characterized by plaintiff in each of his complaints. He relies upon it as a mortgage and asks its foreclosure. It was capable of record and is clearly within the terms "all deeds of trust and mortgages whatsoever" of Par. 749 R. S., and just as clearly within the terms of the construction of that section by the Supreme Court of Texas in the case of Senter vs. Lambeth, 59 Tex. 259 wherein they say that the equitable liens excluded from the operation of that section are only those "not susceptible of Registration" and that all rights and interests "represented by some written instrument that is required or permitted to be recorded and which he has neglected to record" are within the terms of the Statute and void as to all creditors.

II.

In determining the question of notice the court omitted to take note of the fact that the property in controversy was attached
75 June 11th, 1903, and that that attachment lien was foreclosed by judgment rendered June 11th, 1904, before even the first complaint in this case was filed, and that the right of all parties to this action were fixed and determined at that time and that under the decisions of the Supreme Court of the United States, neither notice or conveyance after that date can affect the purchaser at the sale under the judgment.
Hitz vs. Nat'l Met. Bank, 111 U. S. 722.

III.

The court refused to give effect to the provisions of Par. 2703 R. S. 1901 on the ground that that paragraph relates only to merchants and traders. The record discloses that the purchase by Smith and Rainey of the premises in question was a business venture. The purpose being, as disclosed by the contract, to subdivide the tract and sell it in lots and blocks, or other subdivisions. In other words, to buy the whole tract at wholesale and sell it at an advanced price at retail.

Even if the conclusion of the court be correct, the paragraph is applicable only to traders, we think the contract and the objects and purposes of the parties to it, as therein set forth, clearly places them in the category of traders.

The court in construing par. 749 follows the familiar rule that having adopted this section from Texas, this court will follow
76 the interpretation it believes the Supreme Court of that State had placed upon it before its adoption by the legislature of this Territory. We concede this to be the rule.

But the court has not applied the same rule in construing par. 2703 which was adopted by this Territory from the Statutes of Mississippi after the Supreme Court of that State had construed it in the case of Gumbel vs. Koon, 59 Miss. 265, in which the court says:

"The object of the statute was to prevent the assertion of secret claims to property as against creditors of the person who seems to be the owner of it, evidenced by his dealings with it, and it conclusively fixes the ownership to be in the person whose sign is exhibited at the place where the business is conducted or who, in the absence of any sign, is the manager of the business".

We think that in adopting this statute this Territory adopted the construction placed upon it by the State of Mississippi and that the same rule should be applied to the Statute of Mississippi as that of Texas.

IV.

We desire to call the attention of the court to one other point only. And we do so for the first time now, because it was for the first time suggested to the court in oral argument by the appellee, and we think it may have influenced, if not controlled the opinion of the court.

The court will note, that the plaintiff has declared on the
77 written instrument, and in his pleading has characterized it as creating a mortgage lien which he asks to have foreclosed. But to evade the provisions of par. 749 regarding the recording of mortgages, counsel suggests that the plaintiff's lien is not dependent upon the written instrument, but exists as a partner's lien independent of the writing. And this, notwithstanding that the Supreme Court of the United States has declared that "taking the instrument as a whole, we are of opinion that it (the instrument) gives the appellant a lien. Whether the defendants nevertheless may not be entitled to priority, is not before us now".

Smith vs. Rainey, 200 U. S. 56.

Now if the lien exists by virtue of the writing only, it is a mortgage lien and may be foreclosed. But if the lien now claimed by Smith exists independent of the writing, then it must be simply the partner's equitable lien. This equitable lien is not a specific lien of one partner upon that portion of the partnership assets standing in the name of one of the other partners, but is a general lien upon all the assets of the partnership. It is in fact only a right to have all the partnership assets applied to the payment of the partnership debts, among which may be a debt due to one of the partners. The partner's lien cannot be enforced against one of the individual partners, but can only be availed of by a dissolution of the part-
78 nership, an accounting between the partners, and the sale of all the partnership assets.

We call attention to this matter only for the purpose of showing that the plaintiff Smith has pursued his remedy in this case on the theory that the lien he claims is not the equitable lien upon all the partnership assets growing out of the partnership relation, but a specific lien upon a particular item of alleged partnership property standing in the name of the individual partner. Therefore the lien for which the plaintiff has sought and obtained a decree of foreclosure, is a specific lien on specific property, created by an instrument in writing permitted and required to be recorded, and which the plaintiff has neglected to record, and is directly within the terms of the Texas decisions of the Supreme Court of Texas construing Sec. 749 of our Revised Statutes of 1910.

In this connection, too, we respectfully suggest that the decision in this case does not seem to be in accord with former holdings of this court.

In the case of Baker vs. Fleming this court had under consideration the question whether the doctrine of vendors' lien should obtain in this Territory. Or as stated by the court, "whether a grantor of real estate by absolute conveyance has an implied equitable lien thereon for the unpaid purchase money. If such a lien arises
79 at all, it must, on principle prevail alike against the grantee himself and all subsequent purchasers with notice."

In denying the existence of such lien this court quotes with approval the following language used by Chief Justice Marshall in Bailey vs. Greenleaf, 7 Wheat. 46:

"It is a secret, invisible trust, known only to the vendor and vendee, and to whose whom it may be communicated in fact. To the world, the vendee appears to hold the estate devested of any trust whatever, and credit is given to him in the confidence that the property is his own in equity as well as law. A vendor, relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien".

And again this court quotes with approval the following language by Judge Gray (afterwards of the United States Supreme Court) in a Massachusetts case in which the question of secret (vendor) liens was under consideration:

"If no third person has acquired any rights in the land by bona fide attachment or conveyance, the original vendor may secure payment of the debt due him for the purchase money by the usual attachment or mesne process. If any third person has acquired rights in the property, there is no reason why equity, any more than the common law should interpose to defeat them".

And in expressing its opinion in the case cited this court says:

"After giving to the question the deliberate consideration
80 which its importance demands, we are forced to the conclusion that this principle of an implied lien for purchase money can have no just application in this Territory. It is opposed to the policy of our legislation, which aims to make the title to real estate as simple and easily understood as possible, and to facilitate its transfer and improvement by discouraging all secret or latent equities, and requiring conveyances and encumbrances thereof to be made matters of public record. Here, our attachment law readily permits a debt to become a lien before judgment, and debts generally are a lien upon the lands of decedents. The doctrine being thus repugnant to our registration law, ill-suited to our condition, and by no means essential to the interests of justice, we ought not to adopt it."

Baker vs. Fleming, 6 Ariz. 418.

It seems to us that the decision of the court in the case at bar is incompatible with the principle announced in the Baker case. That the doctrine of secret liens therein denounced and repudiated as being inconsistent with that simplicity and openness of land titles which shall facilitate its transfer and improvement and its use as security which it heretofore has been the policy of our laws to foster and encourage is, by the decision in this case, established in our jurisprudence and the principle of the decision of the Baker case is disapproved.

If the decision in this case is adhered to, the record title to real estate in this Territory and the abstracts thereof upon the faith and credit of which vast amounts of capital are invested in the form of loans and transfer, can no longer be regarded as showing the
81 true state of *of* the title, upon which investors may safely rely.

We trust the court will again, upon this motion, carefully examine the basis of the decision in this case before finally establishing in our jurisprudence a principle, the consequences of which will be so far reaching, and as we believe disastrous.

Respectfully submitted,

KIBBEY, BENNETT & BENNETT,
Attorneys for Appellants.

And on to-wit: the 20th day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellants, be submitted.

And on to-wit: the 21st day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause,
87 in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellants, and heretofore submitted, be, and the same is hereby denied.

And on the same day to-wit: the 21st day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day comes Mr. Jos. H. Kibbey for appellants herein, in open court, and gives notice of appeal to the Supreme Court of the United States from the judgment of this court, and

Upon motion of Mr. Jos. H. Kibbey, it is ordered that the appeal be, and the same is hereby allowed, and the amount of the Supersedeas Bond be fixed in the sum of Ten Thousand ($10,000.) Dollars and the Appeal Bond fixed in the sum of One Thousand ($1,000.) Dollars.

And on to-wit: the 23rd day of June, 1910, came the appel-
88 lants by their attorneys, and filed in the clerk's office of said court in said entitled cause a certain order allowing appeal and fixing Supersedeas Bond, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

Before the Honorable John H. Campbell, Associate Justice of the Supreme Court of the Territory of Arizona.

The above named Frank Luke and John Luke having prayed an appeal to the Supreme Court of the United States from the decision, order and judgment of the Supreme Court of the Territory of Arizona rendered in the above entitled cause on the 2nd day of April, 1910, whereby the said Supreme Court affirmed the order, judgment

and decree of the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa in said cause entered in said District Court on the 27th day of March, 1909, whereby it was, among other things, ordered, adjudged and decreed
84 that the judgment recovered by said Jesse Hoyt Smith in said action against the defendant William J. Rainey, for the sum of Twenty-eight Thousand Two Hundred Twenty-four and 2/100 ($28,224.02) Dollars, with interest and costs of suit, should be a superior and prior lien on the undivided one-third interest in and to the property described in the complaint in said action heretofore owned by said William J. Rainey, and the legal title to which is now held by the defendants and appellants Frank Luke and John Luke, and that the said lien be foreclosed and that the said premises be sold as under execution in satisfaction of said judgment; and the said Frank Luke and John Luke having prayed for a supersedeas suspending the operation of said judgment pending said appeal; it is ordered that the said appeal be, and the same hereby is allowed.

And it is further ordered that the operation of said judgment in so far as it directs that the property of the said appellants Frank Luke and John Luke be seized and sold in satisfaction of said judgment, be suspended pending the determination of this appeal by the Supreme Court of the United States upon the said appellants, Frank Luke and John Luke, executing an appeal bond in this cause in the sum of Ten Thousand ($10,000) Dollars, conditioned that the said appellants shall prosecute their said appeal to effect, and shall answer
85 all costs and damages, if they shall fail to make their plea good, and shall pay to the said Jesse Hoyt Smith all damages which he shall sustain by reason of the granting of such supersedeas and the staying of the sale of said premises under such judgment and order of sale in satisfaction of said judgment pending this appeal, and all costs which shall be adjudged against him on such appeal.

Done at Phoenix, the Capital, this 15th day of June, 1910.

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Arizona.

And on the same day, to-wit: the 23rd day of June, 1910, came the appellants by their attorneys, and filed in the clerk's office of said court in said entitled cause their certain Assignment of Errors in words and figures following, to-wit:

86 In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,

vs.

WM. J. RAINEY et al., Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

Assignment of Errors.

I.

The Supreme Court of the Territory of Arizona erred in offering the judgment of the trial court in said cause.

II.

The Court erred in holding that by virtue of the partnership created by the contract between Smith and Rainey, Rainey became a trustee for Smith of the undivided one-third of the premises in controversy, and that by virtue thereof Smith has a lien thereon for the amount found due him from Rainey.

III.

The court erred in holding that the original unverified complaint filed in this case gave to Frank Luke and John Luke constructive notice of the existence of a partnership between Smith and Rainey and all the equities arising therefrom.

87 IV.

The Court erred in holding that the unrecorded contract between Smith and Rainey is not within the provisions of paragraph 749 of the Revised Statutes of Arizona of 1901 and void as to all creditors of Rainey.

V.

The court erred in holding that if the Lukes had notice, actual or constructive, of the terms of the written, but unrecorded contract between Smith and Rainey, prior to their purchase of the premises at their execution sale, they took the title thereto subject to all the equities between Smith and Rainey arising, though they had no notice, actual or constructive, of the existence of such contract or any equities arising thereunder at the time of the levy of their attachment or the rendition of the judgment and attachment of the judgment lien under which the property was sold.

VI.

The Court erred in holding that paragraph 2703, Revised Statutes of Arizona 1901 relates only to merchants and traders and is not applicable to the facts in this case.

VII.

The Court erred in holding that the contract sued on in this case gives Smith a lien upon Rainey's undivided one-third interest
88 in the premises in controversy, and that said lien is prior and superior to the title thereto acquired by the Lukes at their execution sale.

VIII.

The Court erred in affirming the decree of the lower court foreclosing an alleged mortgage lien in favor of the plaintiff Smith upon the undivided one-third interest standing of record in the name of Rainey, and declaring said lien to be prior and superior to the title to said undivided one-third interest acquired by the Lukes at their execution sale.

KIBBEY, BENNETT & BENNETT,
Attorneys for Appellants Frank Luke and John Luke.

And on the same day, to-wit: the 23rd day of June, 1910, came the appellants by their attorneys, and filed in the clerk's office of said court in said entitled cause their certain Supersedeas Bond in words and figures following, to-wit:

89 In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WILLIAM J. RAINEY et al., Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

Know all men by these presents That we, Frank Luke and John Luke, as principals, and W. T. Smith and J. W. Walker, as sureties, are held and firmly bound unto Jesse Hoyt Smith in the penal sum of Ten Thousand ($10,000.00) Dollars lawful money of the United States, for which sum well and truly to be paid unto the said Jesse Hoyt Smith, we bind ourselves, our heirs, executors, administrators and assigns jointly, severally and firmly by these presents.

Sealed with our seals and dated this 15th day of June, 1910.

The conditions of this obligation are such that,

Whereas, on the 27th day of March, 1909, the said Jesse Hoyt Smith, in a certain cause then pending in the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, wherein said Jesse Hoyt Smith was plaintiff and William J. Rainey, Lillian Rainey, Frank Luke and
90 John Luke were defendants, did recover a judgment against said William J. Rainey for the sum of Twenty-eight Thousand Two Hundred Twenty-four 02/100 Dollars ($28,224.02) with interest thereon at the rate of six per cent per annum, together with the costs of said action taxed at Thirty-three and 90/100 Dollars, and which said judgment is thereby declared to be a prior and superior lien upon the undivided one-third interest in and to the following described premises, viz:

Section Twenty-two (22), Township Two (2) North, Range Three East of the Gila and Salt River base and meridian (excepting therefrom the northwest quarter (¼) of the northwest quarter (¼) of said section). Together with seven and one-half (7½) water rights in the Arizona Canal numbering from one hundred and one (101) to one hundred and eight (108) inclusive, deeded and affixed to said premises, the legal title to which is held by the said Frank Luke and John Luke, and which said judgment directs that an order of sale issue out of said Court to the Sheriff or any Constable of said Maricopa County, directing him to seize and sell said premises as under execution in satisfaction of said judgment, and

Whereas, upon appeal of said cause to the Supreme Court of the Territory of Arizona, the said Supreme Court of the Territory of Arizona did affirm said judgment, and

91 Whereas, the said Frank Luke and John Luke have prayed an appeal from the judgment of the Supreme Court of the Territory of Arizona affirming the said judgment of the District Court of the Third Judicial District of the Territory of Arizona, and a supersedeas staying the sale of said premises in satisfaction of such judgment pending such appeal to the Supreme Court of the United States, which appeal and supersedeas have been duly allowed by Hon. John H. Campbell, Associate Justice of the Supreme Court of the Territory of Arizona, upon the execution by the said Frank Luke and John Luke of good and sufficient bond to the said Jesse Hoyt Smith in the penal sum of Ten Thousand ($10,000.00) Dollars, conditioned as in said order allowing said appeal provided.

Now, therefore, if the said Frank Luke and John Luke shall prosecute their said appeal to effect and shall answer all damages and costs if they shall fail to make their plea good, and shall pay to the said Jesse Hoyt Smith all damages which he shall sustain by reason of the granting of such supersedeas and the staying of the sale of said premises under such judgment and order of sale in satisfaction of said judgment pending said appeal, and all costs which shall be adjudged against them on such appeal, then this obligation to be void; otherwise to remain in full force and virtue.

FRANK LUKE.
JOHN LUKE.
J. W. WALKER.
W. T. SMITH.

92 TERRITORY OF ARIZONA,
County of Maricopa, ss:

Before me, Ethel Whitlow, a Notary Public in and for said County in said Territory, personally came, this 15th day of June, 1910, W. T. Smith and J. W. Walker sureties on the foregoing appeal bond, and being duly sworn, each for himself and not one for the other, says that he is worth Ten Thousand ($10,000.00) Dollars over and above his just debts and liabilities, exclusive of property exempt from execution.

W. T. SMITH.
J. W. WALKER.

Subscribed and sworn to before me by each of said affiants, severally, this 15th day of June, 1910.

Witness my hand and official seal.

[SEAL.] ETHEL WHITLOW,
Notary Public.

My commission expires February 6, 1913.

Approved:
JOHN H. CAMPBELL,
Associate Justice.

93 And on the same day to-wit: the 23rd day of June, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Statement of Facts in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WM. J. RAINEY et al., Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

The defendants, Frank Luke and John Luke, having prayed an appeal from the judgment and decision of this Court heretofore during the January Term, 1910, thereof rendered and made in this cause, and said appeal having been allowed, and said defendant having also prayed that this court make and certify a finding and statement of facts in this cause to be transmitted and used on said appeal, this court does hereby make and certify the following statement of facts herein, being the facts found by the trial Court, viz:

1.

That on March 20th, 1897, the plaintiff Jesse Hoyt Smith, and the defendant William J. Rainey, purchased from the Ari-
94 zona Land and Stock Company, a corporation, the premises described in the plaintiff's complaint for the sum of eighteen thousand ($18,000) dollars; that the total purchase price of said premises was the said sum of eighteen thousand dollars, all of which said sum was advanced and paid over to said Arizona Land and Stock Company by said Jesse Hoyt Smith on March 20th, 1897, and thereupon the said Arizona Land and Stock Company executed, acknowledged and delivered to said Smith and Rainey a warranty deed to said premises, conveying an undivided two-thirds interest therein to said Smith and an undivided one-third interest therein to said Rainey; the granting clause in which deed is in the words and figures following, to-wit:

"Have granted, sold and conveyed, and by these presents do sell, grant and convey unto the said Jesse Hoyt Smith, an undivided two-thirds (⅔) interest, and unto the said William J. Rainey an undi-

vided one-third (⅓) interest, of, in and to all those certain premises situated in Maricopa County, Arizona Territory, as follows, to-wit

Section twenty-two (22), Township Two (2) North, Range Three East of the Gila and Salt River Base and Meridian (excepting therefrom the northwest quarter (¼) of the northwest quarter (¼) of said Section). Together with seven and one-half (7½) water rights in the Arizona Canal, numbering from one hundred and one (101) to one hundred and eight (108) inclusive, deeded and affixed to said premises."

And that on said 20th day of March, 1897, the said deed was duly recorded in the Recorder's Office of said Maricopa County, Arizona.

2.

That during the latter part of April, 1897, namely, on or
95 about April 29th, 1897, the said William J. Rainey and Jesse Hoyt Smith executed the contract in writing bearing date March 20th, 1897, a copy of which is attached to the second amended complaint in this cause, and is in the words and figures following, to-wit:

"This Memorandum of Agreement, Made this 20th day of March, 1897, by and between Jesse Hoyt Smith, of Milwaukee, Wisconsin, and William J. Rainey, of Cleveland, Ohio, parties hereto,

Witnesseth: that whereas the said parties have this day purchased a certain tract of land known as Section 22 Township 2, North, Range 3 East of G. and S. R. Meridian, Maricopa County, Arizona, except the N. W. ¼ of the N. W. ½ of said Section, for the sum of Eighteen Thousand Dollars ($18000) in cash, said tract of land having been purchased by the said parties in the proportion of an undivided two-thirds (⅔) interest to the said Jesse Hoyt Smith and an undivided one-third (⅓) interest to the said William J. Rainey according to a deed now on record in the office of the County Recorder of Maricopa County, Arizona, in book 43 of Deeds, pages 565-6-7;

And Whereas the said tract of land was so conveyed free and clear of all liens and incumbrances, and the full consideration for the whole thereof, being Eighteen Thousand Dollars ($18,000) was paid in cash Jesse Hoyt Smith and said William J. Rainey has agreed to repay to said Jesse Hoyt Smith the one-third (⅓) thereof with interest thereon at six per cent per annum as hereinafter provided.

And Whereas said parties have joined in said purchase for the purpose of platting, grading and otherwise improving said property, and so improved selling and disposing of the same at a profit.

Now therefore, the parties hereto do, and each for himself doth, agree with the other in the manner following;

First. That the improvement of said tract of land shall be commenced not later than the 1st day of January, 1898, and such improvements be thereafter continued with reasonable diligence and dispatch until the same shall be in marketable condition as lots

96 Second. That the improvements aforesaid shall consist of the surveying and platting the entire tract into lots, the opening up and grading of all the streets; the planting of suitable shade, ornamental and fruit trees, and the making of all such other improvements as may be hereafter agreed upon between the parties hereto.

Third. That said Jesse Hoyt Smith, in addition to the sum of Eighteen Thousand Dollars ($18,000) so advanced by him as aforesaid, shall also from time to time make all necessary advances of money for the improvements aforesaid, and also all such as shall be required for the running and incidental expenses of the undertaking, including taxes, irrigation charges, marketing said lots and the reasonable and necessary expenses of said William J. Rainey from Cleveland, Ohio, to Phœnix, Arizona, and return, and his living expenses when in Arizona while engaged in business relating to said property.

Fourth. That all money advanced by said Jesse Hoyt Smith in said purchase, as well as all such as shall be hereafter advanced by him for any of the purposes aforesaid, shall be considered and treated as a loan or loans by him, and shall be paid to him as rapidly as possible from the receipts from the sale or sales or other income of said property until the same shall be fully paid, with interest at six per cent per annum, and before any division of profits shall be made or paid.

Fifth. That if at the date of five (5) years from the date hereof, all the loans aforesaid shall not have been fully paid to said Jesse Hoyt Smith, with interest as above provided, then and in that event said William J. Rainey hereby agrees that he will on demand thereafter pay to said Jesse Hoyt Smith the one-third (⅓) of all such loans then unpaid, including interest thereon as aforesaid.

Sixth. That said William J. Rainey shall have general management of said tract of land, including the improvements thereof as aforesaid, and the employment of all labor and making of all contracts necessary therefor, and also including the handling and sale of said lots when so improved; provided, however, that no contracts or other obligation on account of said property exceeding in the aggregate the sum of Five Thousand Dollars ($5000.00) shall be entered into without the previous written consent of said Jesse Hoyt Smith, and no contract for the sale of any such lots shall be made except at prices and on terms to be agreed upon between the parties hereto; provided always that said William J. Rainey shall at
97 all times and from time to time give to said Jesse Hoyt Smith true accounts of all transactions relating to the business, and full information in regard to all matters which shall come to his hands or knowledge respecting such business, and shall give due regard to his wishes and directions respecting the same.

Seventh. That said William J. Rainey shall keep full, true, correct and proper books of account of all the transactions and dealings relating to said business, which shall at all times be open to the inspection of said Jesse Hoyt Smith; and that he will on the 10th day of each month render to said Jesse Hoyt Smith an account in full

of all transactions during the preceding month, including all contracts made and all disbursements and receipts, and showing all the assets and liabilities of the partnership.

Eighth. That said William J. Rainey hereby agrees to accept the said general management of said tract of land, without other consideration or remuneration excepting only his one-third (⅓) share in the net profits of such business as is hereinafter provided.

Ninth. That after the repayment to said Jesse Hoyt Smith of the said sum of Eighteen Thousand Dollars ($18,000) so advanced by him for the purchase of said tract and the repayment of all advances which shall be hereafter made by him on account of said property or said business, together with interest on all such sums at six (6) per cent per annum, the net profits of said land and business shall be divided between the parties hereto as follows: Said Jesse Hoyt Smith shall be entitled to the two-thirds (⅔) thereof, and said William J. Rainey the one-third (⅓) thereof; and the losses, if any, shall be shared between the parties in ratio aforesaid.

It is further agreed and understood between the parties hereto that this Memorandum of Agreement is made for the purpose of stating explicitly the terms of copartnership on which the said Jesse Hoyt Smith and William J. Rainey have joined in the purchase, improvement and sale of said tract or lots, and that each will fulfill in good faith and to the best of his ability the articles herein contained. Which covenants and agreements shall extend to and bind the respective parties and their respective legal representatives.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

J. HOYT SMITH. [SEAL.]
WM. J. RAINEY. [SEAL.]

98 In presence of
J. W. DADMUN.
Z. M. CHANDLER."

8.

That on the 28th day of November, 1898, the said William J. Rainey executed and delivered to one Anthony G. Hubbard a mortgage upon an undivided one-third interest in said premises to secure the payment of a promissory note of said Rainey to said Hubbard for the sum of $3000, of even date therewith, due November 28th, 1901, with interest thereon at the rate of 8½% per annum, which said mortgage contained the following clause, namely: "And the said William J. Rainey hereby covenants that he is well and truly seized of a good and perfect title to the premises above conveyed, in law, in fee simple, and has good right and lawful authority to convey the same to the party of the second part, his heirs and assigns, and that the title so conveyed is clear, free and unencumbered, and that he will warrant and defend the same forever to the party of the second part, his heirs and assigns against all claims whatsoever."

That said mortgage was duly acknowledged and was on December 6th, 1898, recorded in the office of the County Recorder of Maricopa

County, Arizona, and was thereafter on the 4th day of October, 1901, released and discharged of record by the mortgagee Anthony G. Hubbard.

4.

99 That at various times between March 20th, 1897, and May 23, 1903, the said Jesse Hoyt Smith, under the terms of the aforesaid contract, advanced the further sum of $32,473.35, and that one-third part of such payments and advances so made by the said Jesse Hoyt Smith, together with interest from the date of such several payments and advances, at the rate of 6 per cent per annum, amounts to the sum of $21,772.17, which said sum was due to said Jesse Hoyt Smith from the said William J. Rainey under the terms of said contract, on May 23, 1903.

That since the 23rd day of May, 1903, and prior to the 28th day of November, 1903, the said Jesse Hoyt Smith advanced the further sum of $1085, one-third part thereof, together with interest thereon from said 28th day of November, 1903, was on the trial of this action due from the said William J. Rainey to the said Jesse Hoyt Smith; and that the total amount due at the date hereof, from the said William J. Rainey to the said Jesse Hoyt Smith, for principal and interest for such advances, under the terms of said contract, is the sum of Twenty-eight Thousand Two Hundred and Twenty-four and 02/100 Dollars. That no part thereof has been paid to the said plaintiff Jesse Hoyt Smith.

5.

That the said Jesse Hoyt Smith has complied with and fulfilled all of the terms and conditions of said contract on his part to
100 be performed, and that the said William J. Rainey has failed and neglected to perform and carry out the terms and conditions of the said contract on his part to be performed and carried out.

6.

That on June 11th, 1902, the record title to an undivided one-third interest in and to Section twenty-two, Township Two North of Range Three East of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona (except the northwest quarter of the northwest quarter of said section), was in said William J. Rainey by virtue of the deed from the Arizona Land and Stock Company to said Jesse Hoyt Smith and William J. Rainey above mentioned, and that on said last mentioned date the said defendants John Luke and Frank Luke commenced an action in the District Court of Maricopa County, Arizona, against the said William J. Rainey to recover the sum of twenty-five hundred (2500) dollars, with interest thereon from April 1st, 1902, and that in said action the plaintiffs therein sued out of this Court a writ of attachment for the said sum of $2500 and interest as aforesaid against the property of the said William J. Rainey to secure the said sum of $2500 and interest aforesaid and caused the same to be delivered to the Sheriff of Maricopa County, Arizona, for service. That on the said 11th

day of June, 1902, the said Sheriff of Maricopa County, by virtue of the said writ of attachment, duly seized and levied the
101 said writ of attachment upon, and attached all the right, title and interest of the said William J. Rainey in and to the above described premises, and on said day filed a copy of said writ of attachment, together with a description of the property attached, with the County Recorder of Maricopa County, and the same was on said day duly filed by him and recorded in said Recorder's office in a book kept by him for that purpose.

That thereafter such proceedings were had in said cause that on the 11th day of June, 1903, the said Frank Luke and John Luke recovered a judgment against the said William J. Rainey for the sum of $2,500.00 with interest thereon at the rate of 6 per cent per annum from April 1st, 1902, together with the costs of said action, and which judgment foreclosed the lien of said attachment upon the premises hereinbefore described as the same existed on June 11th, 1902, and ordered and directed that same be sold as under execution to satisfy said judgment.

That on the 6th day of August, 1903, an order of sale was duly issued out of said Court in said cause directed to the Sheriff of Maricopa County, Arizona, commanding him to seize and sell as under execution the premises and property hereinbefore mentioned to satisfy said judgment, and that by virtue thereof, the said Sheriff did seize the said premises and property, and pursuant to a notice duly published and posted as required by law, did, on the
102 8th day of September, 1903, sell the said premises and property at public auction to the highest and best bidder, and that the defendants Frank Luke and John Luke were the purchasers at said sale, and did purchase the said premises at said sale for the sum of twenty-nine hundred dollars and seventy-six cents ($2,900.76), the said amount being the full amount of said judgment and costs, and that thereupon the said Sheriff executed and delivered to said defendants Frank Luke and John Luke the usual certificate of purchase of said premises, and that thereafter on the 29th day of December, 1903, the said Sheriff returned the said execution and order of sale unto the office of the Clerk of this Court, showing the said judgment and said execution and order of sale to be fully satisfied and discharged by the sale of said premises. That thereafter on the 20th day of June, 1904, no redemption of said premises from said sale had been made, and that on the said last mentioned date the Sheriff of Maricopa County, Arizona, executed, acknowledged and delivered — the said Frank Luke and John Luke a Sheriff's Deed to said premises.

7.

That the said contract attached to the said second amended complaint, as Exhibit A thereof, has never been filed for record in the Recorder's office of Maricopa County, Arizona, and that the said defendants Frank Luke and John Luke had not nor had
103 either of them any knowledge or notice of the existence of said contract at any time prior to the filing of the plaintiff's second amended complaint herein, to which a copy of said contract

is attached as Exhibit A, on December 31, 1903, saving and excepting such notice actual or constructive as was imparted to them by the pleadings in this cause, or which the law imputed to them from such pleadings.

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Arizona.

And on to-wit: the 28th day of June, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Bond on Appeal in words and figures following, to-wit:

104 In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

Know all men by these presents that we, Frank Luke and John Luke, as principals, and D. C. Babbitt and Wm. E. Thomas, as sureties, are held and firmly bound unto Jesse Hoyt Smith in the penal sum of One Thousand ($1,000) Dollars lawful money of the United States, for which sum well and truly to be paid unto the said Jesse Hoyt Smith, we bind ourselves, our heirs, administrators and assigns jointly, severally and firmly by these presents.

Sealed with our seals and dated this 22nd day of June, 1910.

The condition of the above obligation is such that,

Whereas, the above named appellants Frank Luke and John Luke have appealed to the Supreme Court of the United States from the final judgment rendered by the above named Court in the above entitled action, and the said appellants have obtained an allowance of their appeal to the Supreme Court of the United States.

105 Now therefore the condition of the above obligation is such that, if the said Frank Luke and John Luke, the above named appellants, shall prosecute their said appeal to effect and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

FRANK LUKE.
JOHN LUKE.
D. C. BABBITT.
WM. E. THOMAS.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Before me, J. C. Phillips, a Notary Public in and for said County, in said Territory, personally appeared, this 27th day of June, 1910, D. C. Babbitt and Wm. E. Thomas, the sureties on the foregoing appeal bond, and being duly sworn, each for himself and not one for the other, says that he is a freeholder within the Territory of Ari-

zona and is worth the sum of One Thousand ($1,000) over and above all his just debts and liabilities in unincumbered property in the Territory of Arizona, exclusive of property exempt from execution.

D. C. BABBITT.
WM. E. THOMAS.

Subscribed and sworn to before me by each of said affiants severally, this 27th day of June, 1910.

106 Witness my hand and official seal.

[SEAL.] J. C. PHILLIPS,
Notary Public.

My commission expires Jan. 17th, 1912.

Approved:
F. A. TRITLE, JR., *Clerk.* [SEAL.]

And on to-wit: the 29th day of June, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Affidavit in words and figures following, to-wit:

107 In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WM. J. RAINEY et al., Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Frank Luke, being first duly sworn, on his oath says, that he is one of the defendants and appellants in the above entitled cause; that he is well acquainted with the premises and property known and described as Section twenty-two (22), Township Two (2) North, Range Three East of the Gila and Salt River Base and Meridian (excepting therefrom the northwest quarter (¼) of the northwest quarter (¼) of said section). Together with seven and one-half (7½) water rights in the Arizona Canal, numbering from one hundred and one (101) to one hundred and eight (108) inclusive, deeded and affixed to said premises, and that an undivided one-third interest in said premises exceeds in value the sum of Five Thousand ($5,000) Dollars; that the matter in dispute in this action, as between the said Jesse Hoyt Smith, plaintiff and appellee, and Frank Luke

108 and John Luke, defendants and appellants, is the right of the said Jesse Hoyt Smith to subject the undivided one-third interest in and to the above described premises to sale under execution upon the judgment recovered by said Jesse Hoyt Smith against the defendant William J. Rainey for the sum of Twenty-eight Thousand Two Hundred Twenty-four and 2/100 ($28,224.02) Dollars.

FRANK LUKE.

Subscribed and sworn to before me this 29th day of June, 1910.
[SEAL.] F. A. TRITLE, JR.,
Clerk Supreme Court.

109 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
State of Arizona, ss:

I, J. P. Dillon, Clerk of the Supreme Court of the State of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record, including the Abstract of Record, Opinion, Judgment, Motion for Re-hearing, Order allowing appeal and fixing bond, Assignment of Errors, Supersedeas Bond, Statement of Facts, Appeal Bond, Affidavit of Value, and all minute entries had and entered of record in a certain cause lately pending in said court, No. 1123, wherein Frank Luke and John Luke, were Appellants, and Jesse Hoyt Smith was Appellee, as the same remain on file and of record in my office, saving and excepting that part of said Abstract of Record containing the Reporter's Transcript of Evidence, Exhibits "C", "D", "E", Memorandum and Statement regarding other Exhibits omitted from the Abstract of Record, which have been omitted by direction of attorneys for Appellants as not necessary on the hearing of this appeal.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached copy of Citation is a copy of the original Citation issued in said cause, the original Citation not now being among the files in this office.

And I further certify that the record shows that on August 19th, 1910, there was filed in this office in said cause an order Enlarging the time for filing the Transcript of Record in the Supreme Court of the United States.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 10th day of December, A. D., 1912, at Phœnix, Arizona.

[Seal Supreme Court, State of Arizona.]

J. P. DILLON,
Clerk Supreme Court of Arizona.

110 In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WM. J. RAINEY et al., Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellees.

UNITED STATES OF AMERICA, *ss:*

To Jesse Hoyt Smith, Appellee:

You are hereby cited and admonished to be and appear at a Term of the Supreme Court of the United States to be holden at Washing-

ton, D. C., within sixty days from the date hereof, pursuant to an appeal filed in the Clerk's office of the Supreme Court of the Territory of Arizona, wherein Frank Luke and John Luke are appellants and Jesse Hoyt Smith is Respondent, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of July, 1910.

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court
of the Territory of Arizona.

We hereby waive the service of the above citation on us and consent that said citation with this waiver may be filed as complete service upon me and as my appearance on said appeal.

C. F. AINSWORTH,
Attorney of Record for Jesse Hoyt Smith.

[Endorsed:] No. 1123. In the Supreme Court of the Territory of Arizona. Jesse Hoyt Smith, Pl'ff & Appellee, vs. Wm. J. Rainey, et al., Defendants; Frank Luke and John Luke, Def'ts & Appellants. Citation. Filed July 12, 1910. F. A. Tritle, Jr., Clerk.

Endorsed on cover: File No. 22,357. Arizona Territory Supreme Court. Term No. 150. Frank Luke and John Luke, appellants, vs. Jesse Hoyt Smith. Filed October 17th, 1910. File No. 23,357.

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Supreme Court of the United States

OCTOBER TERM, 1912.

No. 150

JESSIE HOYT SMITH, *Plaintiff and Appellee,*

vs.

WILLIAM J. RAINEY, LILLIAN RAINEY and FRANK LUKE and JOHN LUKE, *Defendants,*
FRANK LUKE and JOHN LUKE, *Appellants.*

BRIEF FOR APPELLANTS.

1.

We think the court will get a better mental grasp of the facts in the case and their correlation by having before it a chronological statement of the events upon which the legal rights of the parties to this controversy are predicated.

March 20th, 1897.

Jesse Hoyt Smith and W. J. Rainey purchased from Arizona Land Stock Company 600 acres of land, and the warranty deed of said company conveying an undivided two-third interest therein to Jesse Hoyt Smith and an undivided one-third interest to W. J. Rainey, for an expressed consid-

eration of $30,000, was placed of record in the Recorder's office of Maricopa County, Arizona.

November 28th, 1898.

Rainey executed a mortgage to A. G. Hubbard of his undivided one-third interest in the land in controversy to secure $3,000. Mortgage recorded December 6th, 1898, in Recorder's office, Maricopa County. In this mortgage Rainey warrants:

> "That he is well and truly seized of a good and perfect title to premises above conveyed in fee simple, and has good right and lawful authority to convey the same to the party of the second part, his heirs and assigns, and that the title so conveyed is clear, free and unincumbered."

June 11th, 1902.

Action commenced by Frank and John Luke against Rainey upon a contract entered into September 1st, 1901, and an attachment sued out and levied on Rainey's undivided interest conveyed by the above deed, and writ and levy recorded in the Recorder's office. This action is No. 3958 of the District Court of Maricopa County, Arizona.

June 11th, 1903.

Judgment rendered against Rainey for $2,500 and interest, with foreclosure of attachment lien and directing the issuing of execution and order of sale; and judgment docketed in Judgment Docket.

July 18th, 1903.

The present action (Case No. 4129) commenced by Jesse Hoyt Smith by filing unverified complaint without copy of instrument sued on attached; making Frank Luke only defendant (Tr. folios 2-5).

September 8th, 1903.

Case No. 3958. Sale of premises attached under execution and order of sale issued August 6th, 1903, and prem-

ises sold to Frank Luke and John Luke for debt, interest and cost, and sheriff's certificate of purchase issued to them.

September 23rd, 1903.

Case No. 4129. Amended complaint filed. Allegations same as original complaint except makes John Luke co-defendant with Frank Luke. Complaint unverified and no copy of instrument sued on attached. (Tr. folios 6—10.).

November 28th, 1903.

Case No. 4129. Demurrer to amended complaint sustained.

December 30th, 1903.

Case No. 3958. Execution and order of sale and sheriff's return thereon filed in the office of the Clerk of the District Court of Maricopa County, showing sale of property attached, to Frank Luke and John Luke for the amount of judgment, interest and costs and judgment satisfied in full, and certificate of sale issued.

December 31st, 1903.

Case No. 4129. Second amended complaint unverified filed, to which was attached a copy of alleged contract between Smith and Rainey, which is the foundation of this action. (Tr. Folios 11—19).

June 20th, 1904.

Sheriff's deed issued and delivered to Frank Luke and John Luke conveying undivided one-third interest in premises in controversy.

STATEMENT OF THE CASE AS SHOWN BY THE ABOVE RECORDS.

On the 20th day of September, 1901, Frank and John Luke and one Rainey were residents of Phoenix, Arizona. The records of the Recorder's office of Maricopa County at that time showed that Rainey was the owner of an undi-

vided one-third and Smith was the owner of the other undivided two-thirds of six hundred acres of land near Phoenix. There was nothing of record to show that the interest of Rainey in the land was other than the fee simple of the one-third of the land, and nothing of record to show that Smith had any other interest in the land than the ownership of the remaining undivided two-thirds. The Lukes had no notice, actual, constructive, or to be imputed that Rainey had any less interest than the record disclosed or that Smith had any greater or other interest in the six hundred (600) acres than the undivided two-thirds as disclosed by the record, or had any claim to or lien upon the interest of Rainey in the land, and no notice, actual, constructive or to be imputed of any relation between Rainey and Smith from which there could flow any legal consequence that would give Smith any greater additional or other interest or claim in the lands than the undivided two-thirds thereof, or Rainey any less or other interest than the undivided one-third thereof.

With this state of things existing, the Lukes and Rainey on that day entered into a contract through which Rainey became obligated to the Lukes to pay them some Twenty-five Hundred ($2,500) Dollars. Rainey refused to perform this obligation, and the Lukes on the 11th day of June, 1902, instituted suit in the District Court of Maricopa County against Rainey to recover $2,500.00, and at the same time sued out a writ of attachment.

At this time the Lukes had no notice actual, constructive or to be imputed of any interest of Smith in the land greater or other than that which the deed disclosed, or that Rainey had any other or less, or of any relation between Rainey or Smith, a legal consequence of which could operate to change these interests.

The writ of attachment so sued out was on the 11th day of June, 1902, levied and became a lien in favor of the Lukes to the extent of the money obligation of Rainey to the Lukes as it might thereafter be determined by the court, upon the interest of Rainey in the undivided one-third of said 600 acres of land.

The suit of the Lukes against Rainey came to trial in due course and such proceedings were had therein, that on

the 11th day of June, 1903, judgment was rendered in favor of the Lukes against Rainey for Twenty-five Hundred ($2,500.00) Dollars and their costs, and foreclosing the lien created by the levy of the attachment and an execution and order of sale of all the interest of Rainey in and to said undivided one-third of said 600 acres of land as that interest existed, and was on the 11th day of June, 1902, the day upon which the writ of attachment was levied. And still the Lukes had no notice, actual, constructive or to be imputed of any fact, or of any legal relation of Smith to Rainey, the legal effect of which would be to change the interest of either of them in said lands as disclosed by the deed.

On July 18th, 1903, after the judgment of Lukes against Rainey and the decree establishing the lien on Rainey's individual one-third interest in favor of the Lukes, Smith, the plaintiff in the case at bar, began this action. In this complaint he alleged that he and Rainey became, on the 20th day of March, 1897, the owners of the 600 acres, he, Smith, "being the purchaser of a two-thirds interest and the defendant, William J. Rainey, being the purchaser of the remaining one-third interest in said property." That he, Smith, advanced all of the purchase money, being Eighteen Thousand ($18,000.00) Dollars. That on the day of purchase he (Smith) and Rainey "entered into a written contract wherein and whereby it was, among other things, agreed that plaintiff (Smith) and defendant (Rainey) having joined in the purchase price of said property for the purpose of platting, grading and otherwise improving the property, and as so improved to sell and dispose of the same; that the plaintiff should advance all the money necessary for the improvement of the said property as contemplated by said agreement and that the plaintiff should be repaid for all such moneys so advanced by him either in the purchase of the said property or in advances made for the improvement of said property as rapidly as possible from the receipts from the sale of or sales or other income of said property until the same should be fully paid, with interest at six per cent per annum. And it was therein further agreed that all moneys so advanced by this plaintiff (Smith) as aforesaid shall be considered as loans made by

him, and that if after five years from the date of said agreement all the money or any portion thereof so advanced shall not have been repaid to this plaintiff (Smith), with interest as herein above set forth then that said defendant, William J. Rainey, agrees to pay on demand thereafter said plaintiff (Smith) herein one-third of all such loans then unpaid, including interest thereon as aforesaid." (See original complaint Tr. folio 3).

That complaint then proceeds to allege that since the purchase Smith has advanced for the purchase of the property and for its improvement various sums aggregating, with interest, the sum of Sixty-five Thousand ($65,000.00) Dollars, none of which has been repaid, although demand has been made by Smith of Rainey therefor.

That the plaintiff, Smith, had done all the things he agreed to do by the written contract, but that Rainey has failed and neglected to do so on his part.

That Frank Luke and Lillian Rainey make some claim to the property.

WHEREFORE the plaintiff Smith prays judgment:

1st. That he (Smith) "be declared to have an equitable *mortgage* lien" on Rainey's interest in the property for $21,772.17.

2nd. That he (Smith) be declared to have a *mortgage* lien upon the interest of Rainey superior to any that Luke or Lillian Rainey may have, if any.

3rd. That he have judgment for the amount due him, and

4th. That Luke and Lillian Rainey be foreclosed of any right, title or interest.

No copy of the alleged written agreement was appended to or filed with this complaint, nor was it, nor has it ever been, recorded in the office of the Recorder of Maricopa County, Arizona.

On the 8th day of September, 1903, after levy and due advertisement, the undivided one-third interest of Rainey

in the 600 acres was in manner and form duly sold at public auction by the Sheriff of Maricopa County, under and by virtue of the order of sale thereof decreed by the Court in favor of the Lukes, and the Lukes became the purchasers thereof, and their judgment against Rainey became thereby satisfied. At this time the Lukes had no notice of any interest that Smith might have in or claim upon said lands, excepting that imparted by the recorded deed showing him simply to be the owner of an undivided two-thirds of said 600 acres, and such notice, if any, as might be imputed by the complaint filed by Smith and which we have just quoted.

A certificate of sale was issued by the sheriff to the Lukes in due course.

After the sale, and after the sheriff's certificate had been issued, Smith filed an *amended* complaint against the Lukes in this case. This amended complaint was filed September 23rd, 1903.

The amendment consisted simply in making John Luke a party defendant to the action. The allegations were the same as the original complaint, and no copy of the agreement was filed with or as a part of this amended complaint.

On the 28th day of November, 1903, the demurrer of the defendants Luke to the amended complaint was sustained by the District Court, and that ruling was subsequently approved by the Supreme Court of the Territory, and by the Supreme Court of the United States. (See Smith vs. Rainey, 209 U. S. p. 56).

On the 31st day of December, 1903, the plaintiff filed his second amended complaint in this case. This was after the sale to Lukes and after the return of the execution and satisfaction of judgment.

This *second* amended complaint for the first time pleads the tenor of the alleged written agreement between Smith and Rainey. The allegations of this amended complaint are practically, otherwise, the same as those of the original and the *first* amended complaint.

In this, the second and last amended complaint, the plaintiff Smith prays judgment that he be declared to have

an *equitable mortgage* upon the undivided one-third interest of Rainey in the premises by virtue of the deed from the Arizona Land and Stock Company above mentioned.

A demurrer to this amended complaint was sustained by the District Court; that judgment was affirmed by the Supreme Court of the Territory. These rulings were later reversed by the Supreme Court of the United States upon the ground that the facts pleaded for the first time in the second amended complaint filed on the 31st day of December, 1903, by setting out *in hec verba* the contract sued on, constituted Smith and Rainey partners, and that as a legal consequence Smith had a lien on the land. No other facts, however, were before the Supreme Court of the United States, and that court was careful to refrain from expressing an opinion as to the priority of the partnership lien which it found to exist over any other possible liens or rights, and said:

> "Whether the defendants (the Lukes) nevertheless may not be entitled to priority is not before us now."

Smith vs. Rainey, 209 U. S. 53-56.
See also Alexander vs. Thompson, 111 N. W. 385.

And the Supreme Court of the United States did, in this case, decide that the facts alleged in the *original,* and in the *first* amended, complaint gave no rights to Smith, the plaintiff, as against the Lukes or any one else claiming adversely to him.

BRIEF OF POINTS AND AUTHORITIES.

I.

Real property conveyed to one member of a partnership, and standing of record in his name in which conveyance and record the other partner participates and acquiesces, though purchased with money advanced to the partnership by such participating and acquiescing partner, is subject to

Specification of errors relied upon.

I.

The court erred in holding W. J. Rainey to be a trustee for Smith of an undivided one third of the premises in controversy.

II.

The court erred in holding Smith's alleged partner's lien to be a lien on Rainey's one third interest in the premises in controversy, and in holding such lien to be superior to the Luke's attachment lien thereon.

III.

The court erred in holding that the appellants had notice of Smith's partner's lien prior to their purchase of the premises in controversy at the sheriff's sale, and that such notice rendered such purchase subject to such alleged partner's lien.

IV.

The court erred in holding that paragraph 2703 Rev. Stat. Ariz. 1901 is not applicable to the facts in this case.

V.

The court erred in affirming the decree of the trial court directing the sale of Rainey's one third interest in the property in controversy in satisfaction of the claim of Smith against the alleged partnership of Smith and Rainey.

an *equitable mortgage* upon the undivided one-third interest of Rainey in the property involved, and that the deed from the Arizona Land and Stock Company above mentioned.

II.

A demurrer to this amended complaint was sustained by the court, and upon refusal of appellant to plead further judgment was rendered in favor of appellees. This judgment was reversed by the Supreme Court of Arizona, on the ground that the facts pleaded for the first time in the second amended complaint filed on the 31st day of December, 1903, by setting out *in hæc verba* the contract sued on, showed an equitable mortgage upon the undivided one-third interest of Rainey in the property involved, and that the deed from the Arizona Land and Stock Company above mentioned was executed to appellant to secure the payment of the purchase money. In rendering this opinion the court said:

III.

And the Supreme Court of the United States did, in this case, decide that the facts alleged in the *original*, and in the *amended* complaint, were not sufficient to show that the deed from the Arizona Land and Stock Company to appellant was executed to secure the payment of the purchase money, and that no equitable mortgage was created thereby in favor of appellant, as alleged by him.

IV.

The court erred in allowing the decree of the trial court directing the sale of Rainey's one third interest in the property in controversy in satisfaction of the claim of Smith against the alleged partnership of Smith and Rainey.

Real property conveyed to one partner in his own name and standing of record in his name in which conveyance and record the other partner participates and acquiesces, though purchased with money advanced to the partnership by such participating and acquiescing partner, is subject to

attachment and execution by the creditors of the partner holding such record title who have no notice of such partnership, and the lien of such attaching and execution creditors is prior and superior to the equitable right of such consenting and acquiescing partner to have the partnership property applied to the payment of his advances to the partnership:

Ebberts Appeal, 70 Pa. St. 79.
Appeal 2nd Nat. Bk. Titusville, 83 Pa. St. 203.
Appeal Geddes and Wife, 84 Pa. St. 482.
Stover vs. Stover, 180 Pa. St. 425.
Cundy vs. Hall (57 Atl. 761), 208 Pa. St. 335.
Blake vs. Nutter, 19 Me. 16.
Hammond vs. Paiton, 58 Mich. 393.
Fords vs. Herron, 4 Munf. (Va.) 316.
Buchan vs. Tumver, 2 Barb. 165.
First Nat. Bk. vs. State Nat. Bank, 89 N. W. (Mich.) 941.
Alexander vs. Thompson, 111 N. W. 385.

II.

By participating and acquiescing in the conveyance to Rainey of an undivided one-third interest in the real estate which he advanced the money to purchase, and by participating and acquiescing in placing such title in Rainey of record, and with notice and without protest permitting Rainey to mortgage the property, and otherwise publicly treat it as his own individual property, the plaintiff Smith waived all right to claim a lien upon said premises prior and superior to that of the attachment and judgment creditors of Rainey, who became such upon the faith and credit of such record title, and without notice of the fact of the existence of such partnership or the making of such advances.

R. S. Ariz., par. 753.
Ford vs. Herron, 4 Munf. (Va.) 316.
Wilhite vs. Boulware, 88 Ky. 160 (10 S. W. 629).

"Even when a partner is entitled to a lien, he may waive it, or by his conduct lose its benefit."
30 Cyc. 701.

III.

The evidence does not disclose that there ever was any outward or visible sign of any partnership existing between Smith and Rainey, or any record thereof or any joint occupation of the property, or the existence of any fact which could impart information of the existence of such partnership to the public or persons dealing with said alleged partners.

Under our statutes under such circumstances property standing of record in the names of the individual partner is to be treated in favor of his creditors as his property.

Par 2703, Rev. Stat. Ariz. 1909. (See appendix).

IV.

It is not contended that the Lukes had any notice, actual, constructive, or to be imputed, of the existence of the contract between Smith and Rainey prior to the filing of the complaint in this case on July 18th, 1903.

The lien of the appellants, Frank Luke and John Luke, was fixed by the levy of their attachment, June 11th, 1902, and by the judgment foreclosing that lien, June 11th, 1903.

Hitz vs. Nat. Met. Bank, 111 U. S. 722.
Stevenson vs. Tex. R. R. Co., 105 U. S. 703.
Reed vs. Munn, 148 Fed. 752.
Mansfield vs. Johnson, 40 So. 196.
Wahrenberger vs. Waide, 45 Pac. 518.
Martin vs. Dryden, 1 Gill (Ill.) 187.
Alexander vs. Thompson, 111 N. W. 385.

And notice of a secret equity, received after judgment and before sale does not affect the purchaser, even though such purchaser be the judgment creditor.

Mansfield vs. Johnson, 40 So. 196.
Robertson vs. McClay, 48 S. W. 35.
Meek vs. Skeen, 60 Fed. 322.

The Supreme Court of Texas stands alone in its opinion that secret equities are not within the protection afford-

ed to judgment creditors by the recording acts. But even that Court only exempts from the operation of the recording acts those secret equities which are of such a *nature* that the holder cannot spread his title on the record, and which are not in their *nature* susceptible of registration and of which the purchaser had notice before the sale.

Parker vs. Coop, 60 Tex. 111.
Seuter vs. Lambeth, 59 Tex. 259-263.
Grace vs. Wade, 45 Tex. 522.
Whittaker vs. Farris, 101 S. W. 456.

But the Federal Courts make no distinction between secret equities and unrecorded deeds regarding the time of notice of their existence as affecting purchasers at execution sales.

Baily vs. Greenleaf, 7 Wheaton (U.S.) 46.
Stevenson vs. Tex. R. R. Co., 105 U. S. 703.
Hitz vs. Met. Bk., 111 U. S. 722.
Reed vs. Munn, 148 Fed. 752.

Neither the original complaint, filed July 18th, 1903, or first amended complaint, filed September 23rd, 1903, were sufficient to give to the Lakes constructive notice of the existence of a partnership between Smith and Rainey in respect to the land in question, or to put them upon inquiry in respect to the contract therein mentioned, because said complaints purport to set out all the material provisions of the contract according to their legal effect, and no mention is therein made of any partnership, or of any facts which would constitute the parties to it partners, and the legal presumption arising from such pleading is that the provisions of the contract did not constitute the parties to it partners.

The fact of such partnership being material to plaintiff's cause of action, and neither such partnership or the facts creating it being alleged, such complaint did not state any cause of action.

"Where there is an omission to state a material fact, one necessary to show a cause of action, the pre-

sumption against the pleader is that such fact does not exist."

B. & M. R. R. vs. Lancaster Co., 4 Neb. 307.
B. & M. R. R. vs. York Co., 7 Neb. 487.
McClure vs. Warren, 16 Neb. 447.
C. R. I. & P. R. R. vs. Shepard, 39 Neb. 523.
Marsh vs. Marshall, 53 Pa. St. 396.

VI.

All proceedings under a judgment relate back to the time of the levy.

Freeman vs. Dawson, 110 U. S. 270.
R. G. R. R. Co. vs. Gomild, 132 U. S. 484.

Judgment creditors and purchasers for value are equally protected and judgment lien attaches to whatever title the debtor had of record.

Columbus Buggy Co. vs. Graves, 108 Ill. 459.

ARGUMENT.

I.

The plaintiff's case rests entirely upon the following propositions, viz.: That the contract between Smith and Rainey (Exhibit "A," folios 15-19.) constituted them partners as between themselves in the transaction which was the subject of said contract; that Smith advanced the money to Rainey to pay for his one-third of the property which was the subject matter of the partnership; that in equity one partner has a lien upon the partnership property for his advances to the partnership; that such lien is superior to the lien of the attaching and judgment creditors of the individual partner or the purchaser at the execution sale under such judgment, having notice thereof prior to such sale, and that plaintiff's original complaint gave constructive notice of such partnership, though it did not set forth or state any of the provisions of the contract which constitut-

ed the parties to it partners, because it was within the power of the appellant to compel the production of the contract by application to the trial court for an order upon the plaintiff to produce it.

We do not dispute the general proposition that partnership assets are first to be applied to the payment of the partnership creditors. This arises from the fact that each partner is personally liable for the partnership debts and therefore has an equitable right to have the partnership assets applied to their extinguishment. The partnership creditors have no specific lien on the partnership assets. Their rights are derivative and must be worked out through the equities of the partners between themselves. In the case at bar the United States Supreme Court has declared that Smith and Rainey were, by the terms of the contract, constituted partners in respect of the real estate in question, and that thereby Smith had a lien on Rainey's third of the land for his share of Smith's advances. This we do not dispute. But it must be remembered that the case was before that Court upon demurrer to the plaintiff's second amended complaint, which contained a copy of the contract constituting the parties to it partners. That the right of the appellant—Lukes—were not before that court, and the court was only passing upon the right of Smith against Rainey under their contract as between themselves, and the court is careful to add that it may nevertheless be that that lien is subordinate to the lien of Rainey's creditors. The comparative equities of these parties and the consequent comparative priority of their liens must depend not so much upon the contract between the partners, but upon the manner in which the partners have dealt with the partnership property.

Originally partnership dealings were confined to the holding and dealing in personal or movable property, the title to which depends upon use, possession and personal control and is not of record. Real estate, being immovable, and the title not dependent upon possession or immediate control and the title in modern times being of record, was not regarded as a subject of partnership. The doctrine of the partners' lien grew up at a time when the partnership

property being confined to chattels openly owned by the partnership; used in the partnership business and therefore subject to the equitable lien of the partners. In modern times partnerships have been extended to the ownership of and traffic in real estate and to a modified extent the doctrine of the partners' lien has been extended to such real estate as is purchased with partnership funds and has been occupied by the partnership and used in the partnership business. But this lien as to real estate is confined to the settlement of the partnership affairs AS BETWEEN THE PARTNERS and is never extended to third parties who either have no notice of the existence of the partnership or no notice of the fact that the real estate is partnership property.

Courts have sometimes said that where the partnership funds have been used to purchase real estate and the title is taken in the name of one of the partners, a resulting trust arises therefrom for the benefit of the other partners. Such statements should always be read in connection with the facts in the particular case in which the statement is made. No doubt there are many cases in which the doctrine of resulting trusts is properly applied to partnership real estate, but it can only be properly so applied when the facts bring the case within the general doctrine of resulting trusts.

Constructive, implied or resulting trusts are fictions of the law, adopted to enforce equity between the parties to a transaction, but cannot arise so as to affect third parties except in cases where one party to the transaction has been guilty of fraud, deceit or bad faith toward the other.

> "In the former—resulting trusts—the books sometimes say that the law presumes an intention; but this is a legal fiction, and the real foundation of the resulting or presumptive trust is 'the natural equity' springing into life through fraudulent or inequitable advantages obtained by means of agreements, express or implied, and accompanying acts of the parties."

Kayser vs. Mongham, 6 Pac. 803.

In all the cases in which the doctrine of a resulting trust has been invoked to defeat the right of the creditors

of the party in whom the legal title of real estate stands of record, such legal title has been obtained by the practice of a fraud, actual or constructive, upon the party in whose favor such resulting trust has been declared. As by a husband taking the money of his wife and purchasing property in his own name; or by any one purchasing property in his own name with funds entrusted to him by another, and without his consent; and such trust might perhaps arise where one partner who by virtue of the partnership has possession and control of the funds of the partnership invests them in real estate and takes the title in his own name without the knowledge or consent of his co-partner. In either case the transaction would be a fraud upon the party or partnership whose money purchased the property.

But this principle can have no application to a case like the case at bar, where the party seeking to invoke the doctrine has himself, not only consented to, but taken part in the transaction by which the title to the property in question has been placed in another. As against that other he may still claim a lien on the property which his money has paid for, but that lien will be postponed to the lien of the creditors of the party in whose name the other party has himself placed the title, and upon the faith and credit of which those creditors have become such.

In a well considered case the Supreme Court of Pennsylvania has passed directly on the question involved in the case at bar.

In this case the title to certain real estate purchased with partnership funds was taken in the names of the individual partners without designating them as such. The question arose as to the priority of right between the execution creditors of the partnership, and an execution creditor of one of the partners, and the court say:

> "As between the partners themselves it is perfectly proper to refer a resulting trust for the firm and to treat the proceeds of the land as assets of the partnership where it is clearly shown that they so regarded the title themselves, and had paid for it out of partnership funds. But partners who take a deed

in their individual right as tenants in common, stand in a very different relation to the public. Their act tends to mislead both purchasers and creditors trusting the apparent state of the title. It is unlike a resulting trust for a third party, whom it would be a fraud to deprive of his estate. Hence the trust for him, if valid, would be protected against all persons, except when affected by the recording acts, or a want of notice. But partners being the owners of the money which pays for the title, have the power of directing its application to suit their own purposes, and can, if they choose, always secure the identity of its character, in the kind of title they take for it. If therefore they take the title to themselves as tenants in common instead of as partners, they, by their own selection, stamp the character of the title so taken, AS TO THOSE WHO AFTERWARDS DEAL WITH THEM."

The court then refers to the fact that creditors in Pennsylvania are not within the protection of the recording acts in that state—though they are in Arizona—and proceeds:

"This is very different, however, from parol evidence to alter the effect of the deed itself which displays the title. To alter a deed so as to make it of different import offends against the spirit of all those laws made to protect the public against fraud and secret titles and prevent a change of right to the prejudice of those who deal upon the apparent legal operation of the instrument. The covinous character of the change in the title in such case is of a kind of that forbidden by the Statutes of 13 and 27 Elizabeth, and the Statute of Frauds and Perjuries. * * It is very clear that honest creditors who are led to give credit to the individual partners on the apparent state of the title in them individually ought not to be met afterwards by a change of face in the deed, by which it takes a partnership aspect contrary to its terms."

Ebberts Appeal, 70 Pa. St. 79.

The court will notice that this is the opinion of the highest court of a state in which creditors are "not within

the protection of the recording acts." How much stronger is the case of the creditor in this Territory which by Legislature enactment has thrown the mantle of protection equally around "all creditors, and subsequent purchasers for a valuable consideration without notice," and placed them upon the same basis.

Rev. Stat. 1901, par. 749. (See appendix).

In Cundey vs. Hall, the court says:

"Purchasers and creditors alike may rely upon the title to real estate as shown by the record, and having done so, the law will not permit their rights, acquired on the faith of the title as thus disclosed to be defeated by parol evidence. When parties take title to land as tenants in common and place it upon record, the act, so far as it may affect purchasers and creditors without notice, must be considered as a declaration by the owners of the character in which they intend to hold the property. Creditors of the partnership composed of the individuals who thus hold the title, cannot therefore enforce payment of their claims out of the property as against the individual creditors of the partners. The latter are entitled to have their claims first satisfied out of the proceeds of the property. * * Land granted to the members of a partnership, paid for with partnership money, the deed placed on record, yet nothing on the face of it to show that it is other than the conveyance to an individual, cannot be turned into personality for partnership creditors by parol testimony or secret agreement, to the destruction of the lien of a judgment entered against the individual grantee. * * * It is settled, that when two or more persons who are partners take title to land as tenants in common, the presumption arising from the deed is that they hold the title as tenants in common in equal shares. As between themselves the deed is not conclusive, but they hold in accordance with the facts. As to purchasers and creditors, they hold in accordance with their recorded title. Taking and recording a deed as tenants

in common gives character to the title of the several holders upon which the public may safely rely. They are bound to take notice of what appears upon the records, and they have a right to act upon what they find there."

Cundey vs. Hall, 57 Atl. 761.

We refrain from further quotation upon this point, but the following authorities which have been carefully selected, will be found to fully support our position:

Appeal 2nd Nat. Bk. Titusville, 83 Pa. St. 203.
Appeal Geddes and Wife, 84 Pa. St. 482.
Blake vs. Nutter, 19 Me. 16.
Hammond vs. Paiton, 58 Mich. 393.
Fords vs. Herron, 4 Munf. (Va.) 316.
Stover vs. Stover, 180 Pa. St. 425.
Buchan vs. Tumver, 2 Barbourch 165.
First Nat. Bank vs. State Nat. Bank, 89 N. W. 941

Alexander vs. Thompson, 111 N. W. 385.

We believe the cases above cited are controlling. They are all cases arising out of the record title of real estate purchased with partnership funds, being intentionally taken by the partners in their individual names as tenants in common, and in which the controversy is as to the comparative equities between the creditors of the individual partners, and either the partners themselves or the partnership creditors through them. In every such case it will be found that the individual creditors have been held to have the superior equity.

The cases relied on by counsel for plaintiff are none of them cases arising out of the partnership relation, but are all cases in which the money of one person has been taken to purchase property, and without his knowledge or consent the title has been taken in the name of another. Such cases are clearly distinguishable from the case at bar.

Should this court adopt the views so clearly expressed in the cases above cited and quoted from, all further argu-

ment is unnecessary, as all questions of constructive or resulting trusts and of notice are eliminated.

II.

Whatever lien the law may give to Smith upon Rainey's undivided one-third interest in the property, by virtue of their alleged partnership in regard thereto, we think that Smith has waived that lien and estopped himself by his conduct from asserting it against the judgment creditors of Rainey. He participated and acquiesced in having a definite portion of the title to the premises conveyed to Rainey in his individual name by the same instrument by which he himself acquired a definite portion of the title in his own individual name, and which conveyance contains no suggestion of a partnership. He acquiesced and participated in placing that conveyance of record, thereby declaring to the public that Rainey was the owner in his individual right of an undivided one-third interest in the premises. Without protest he permitted Rainey to treat the title thus conveying to him as his own, by executing and recording a mortgage thereon to A. G. Hubbard for $3,000, in which mortgage Rainey declared himself to be the exclusive owner of said undivided one-third interest, with good right and lawful authority to convey and mortgage the same, with full covenants of warranty. He permitted the title so conveyed to Rainey to so remain of record that upon the faith and credit thereof the Lukes so dealt with Rainey that he became indebted to them, and with the contract in writing constituting himself a partner with said Rainey in respect to said premises in his exclusive possession capable of being recorded, he kept it off the record and concealed until the rights of the appellant had become fixed and their lien perfected by attachment and judgment.

We think by his conduct Smith has waived his lien as to the creditors of Rainey and has estopped himself from asserting it against them.

Alexander vs. Thompson, 111 N. W. 385.

III.

It will be noted that there were no facts outside of the contract, which was in Smith's exclusive possession, to put

the Lukes upon notice of the existence of any partnership relation between Smith and Rainey. No partnership articles were of record. No partnership name or title was adopted or used in the transaction of their joint business. In fact, the terms of the contract contemplate that Rainey shall have exclusive charge and control of the enterprise and possession of the property, as it provides for Rainey's exclusive operation and control, and his report to Smith of his operations (folios 16–17). We insist that it is the policy and purpose of the recording acts of this Territory and of our statutes regarding partnerships and partnership property that every man shall disclose his estate for the benefit of his creditors or those who may become such upon the faith and credit of his estate thus disclosed. To this end our recording acts declare all unrecorded conveyances void as to creditors; partnerships are required to set forth of record the names and residences of all the members of such partnerships (R. S. par. 3520), and under the head of Frauds and Fraudulent Conveyances if any partner in a partnership do business in his own name or with a fictitious or formal addition thereto which does not reveal the names of his partners, all property standing in his name is declared to be subject to his debts, to the exclusion of the debts of such partnership. (R. S. par. 2703. See appendix).

It seems to us that this statute is conclusive of this case, and that the Lukes as creditors of Rainey are directly within its letter and spirit. Rainey was by the terms of the contract to conduct the business of the partnership in his own name and he did so conduct it without any reference to Smith whatever. The property attached and sold under the judgment foreclosing the attachment was standing in the name of Rainey, and by the terms of this statute is to be treated as to his creditors as his property, and we think the condition was just such as the statute above cited was designed to meet, and that this statute is conclusive of this case.

This section of our statute was first adopted by this Territory by Act No. 8, page 6, Laws of 1891. It was adopted from the Statutes of Mississippi and is a verbatim copy of Sec. 1300 of the Revised Statutes of that State of 1880.

Prior to its adoption by this Territory, that state had repeatedly construed the statute.

In Gumbel vs. Koon, the Supreme Court of that state, in considering the statute, says:

> "The object of the statute was to prevent the assertion of secret claims to property as against creditors of the person who seems to be the owner of it, evidenced by his dealings with it, and it *conclusively* fixes the ownership to be in the person whose sign is exhibited at the place where the business is conducted, or who, in the absence of any sign, is the manager of the business."

Gumbel vs. Koon, 59 Miss. 264.

In Howe vs. Kerr, the same court says:

> "The uncontradicted evidence is that Kerr transacted the business in which he was engaged, in his own name, and that no sign was displayed at the place disclosing that Montgomery had any interest therein, and that the property was used and acquired in that business. Under these circumstances, such property is, by express provision of the statute, liable for the debts of the person so transacting the business, and to be 'in all respects treated in favor of his creditors, as his property.' "

Howe vs. Kerr, 69 Miss. 311.

In the case at bar the very contract which it is claimed constitutes the parties to it partners shows that the plaintiff Smith was a resident of Wisconsin and Rainey a resident of Ohio. That Rainey was to go to Phoenix, Arizona, and take charge of the enterprise (folio 16). That he should have the general management of the business, make all contracts, hire all labor, and handle and sell the property (folio 17). The contract does not contemplate that Smith shall take any part in the enterprise except to furnish the funds and receive his share of the profits, because Rainey is to report to Smith on the 10th day of each month and

give a full account of his receipts and disbursements on account of the enterprise. There can be no doubt that Rainey was transacting the business in his own name within the meaning of the statute referred to and that, at least the property standing of record in his name, and which he mortgaged in his own name, and in which mortgage duly recorded he covenanted that "he is well and truly seized of a good and perfect title to the premises above conveyed, in law in fee simple, and has good right and lawful authority to convey the same," is subject to his debts.

IV.

The Territorial court found that the appellants—Lukes—had no notice of the existence of the contract between Smith and Rainey except such as was conveyed to them by the pleadings in this case (folio 102), but that, as a conclusion of law, the original complaint by its statement of the existence of the contract between Smith and Rainey, placed the Lukes upon inquiry and gave them constructive notice of all the provisions of the contract (folio 23-70).

As we have already shown, we think the question of notice is not in this case, and that it is immaterial whether the original complaint gave such constructive notice or not, because that original complaint was filed July 18th, 1903, whereas the Lukes' attachment was levied June 11th, 1902, and judgment foreclosing the lien of that attachment and ordering sale of the premises was entered June 11th, 1903, by virtue of which the rights of the Lukes were fixed and determined and could not be affected by any notice actual or constructive.

From the numerous authorities upon this point cited in our brief we select the following for quotation, viz.:

> "As the deed of trust in question was not recorded until several weeks after the judgment of the bank against Hitz was recovered, and as there is no evidence that the bank ever had actual notice of its existence until after execution was issued and levied on Hitz's interest in the property, we entertain no doubt but that

the conveyance would be ineffectual against the bank, or any purchaser at the sale under that judgment."

Hitz vs. Nat. Met. Bank, 111 U. S. 722.

"A creditor, therefore, who attaches real estate standing upon the records in the name of the attachment defendant, acquires a lien upon the property attached, by virtue of the statute, which takes precedence of an outstanding unrecorded title or interest, provided the attachment is made without notice or knowledge of the outstanding title or interest."

Wahrenberger vs. Waide, 45 Pac. 518.

"The notice given on the day of sale was unavailing, because the rights of the purchaser at the sale, whether such person be the execution creditor or a third person, are fixed by the status existing at the time the lien is acquired, and not by the status existing at the time of the sale. * * * If at the time the lien is acquired the creditor has no notice, actual or constructive, of equities of third persons in real estate the title to which stands in the name of the judgment debtor as the apparent absolute owner, the purchaser at the execution sale thereof takes a good title and is protected as a bona fide purchaser, even though the creditor or purchaser had notice of the equities of others at the time of the sale."

Mansfield vs. Johnson, 40 So. 196.

But we think the court is clearly in error in holding that the original complaint gave to the Lukes constructive notice of the existence of a partnership between Smith and Rainey, from which relationship all alleged rights of Smith must flow.

A reading of the allegations of the original complaint filed July 18th, 1903, and of the amended complaint filed September 23rd, 1903, shows that the contract relied upon as the foundation of the plaintiff's right is attempted to be

set forth, not IN HEC VERBA, but according to its LEGAL EFFECT. It purports to set forth and describe all the covenants, agreements and provisions of the instrument according to their legal effect and the result of ALL its provisions so set forth is declared to be to create a MORTGAGE LIEN on the premises, which they ask to have foreclosed. In the whole pleading no suggestion is made of a trust, or of any fact or covenant or provision in the contract which would constitute the parties partners. The pleading, after reciting the conveyance to Smith and Rainey of several interests in the property, sets forth that the written contract was that Smith should advance all the money necessary for the improvement of the property, and that one-third of all the money advanced, either for purchase or improvement, shall be repaid by Rainey, if not previously repaid out of sales of the property; and that under that contract Smith had advanced for the purchase and improvement of the property $65,316.51.

These provisions of the contract did not constitute a partnership.

The Supreme Court of the United States had previously decided that such agreements and provisions do not constitute the parties partners.

Clark vs. Sidway, 142 U. S. 682.

And in the case at bar, after reciting all these facts, which were the only ones stated in the original complaint and were relied on by counsel for Smith in that court, the court declares that all these facts not only did not create a partnership, but did not create any lien at all, but only a personal undertaking, with an indication of a fund as the limit and only source of repayment, until the five years should have elapsed.

Smith vs. Rainey, 209 U. S. 43.

Where the pleader declares upon a written contract by its legal effect it will be presumed that he has stated all the essential elements of the writing; that he has stated its

provisions correctly, and failure to allege any fact material to the remedy he seeks raises the presumption that such fact does not exist.

C. R. I. & P. R. R. vs. Shepard, 39 Neb. 523.
Marsh vs. Marshall, 53 Penn. 396.
Hughes vs. Murdock, 45 La. 935.
McClure vs. Warren, 16 Neb. 447.

A writing declared on but not set out IN HEC VERBA or with copy attached, must be taken to be as set out in the declaration.

"The writing declared on, not being made a part of the record, we must assume it to be correctly set forth in the declaration."

Pollard vs. McClain, 10 Ky. 24.

"Where the party states and names the right under which he holds, such information will not excite inquiry as to any other or different right."

Fire Ass'n vs. Flournoy, 84 Tex. 632.

In this case the written instrument which it is claimed reveals the existence of a resulting trust in the premises in controversy in Smith, was in Smith's exclusive possession. He declared upon it in this case, but studiously avoided attaching a copy to his complaint; or his first amendment thereof, but assumed instead to state its provisions. We had a right to assume that all of the provisions of the contract, so far as they had any legitimate bearing upon the rights of Smith thereunder, were set out in these pleadings. One who assumes to set out a written instrument according to its legal effect instead of attaching a copy to his pleading, and omits to state the very provisions which form the basis of his alleged right, convicts himself either of ignorance or duplicity. If we are to be charged with notice of a resulting trust in this case, it is on the theory that we have received such information as would put a prudent man upon

further inquiry, and that we have been guilty of negligence in not doing so. Can it be negligence to believe and rely upon the written statements of the party having the exclusive possession of the instrument as to what its provisions are? And can such negligence be imputed to us by and for the benefit of the party who has made the statements because the statute gives us the right to go to the court in which the cause is pending, and get an order for the inspection of the papers? We had a right to rely upon the statement of the pleader and to believe that every material provision of the contract had been set forth according to its legal effect. To permit the party who has made a written statement to us of the provisions of the contract in his exclusive possession, and under which he claims his right, to charge us with negligence for not invoking the aid of the court to compel the production of the contract that we might see whether or not he has correctly stated it, is to permit the party to take advantage of his own wrong; to place a premium on duplicity, and to make the pleading in a case a snare and a delusion, instead of a "statement of the facts constituting the plaintiff's cause of action or the defendant's ground of defense," as provided by paragraph 1277, R. S.

We think the law is otherwise, and we are not without judicial authority upon the point.

In Converse vs. Blumrich, the court says:

> "As between himself and Converse, Blumrich had fully discharged his duty by making the inquiry; and the former will not be heard to claim that Blumrich should have received and acted upon prior information, instead of the positive statements made by himself to the contrary. When one seeks the best authority to ascertain the truth of rumors, and is there misled, the person misleading him can hardly be allowed to support rights by insisting that he should still be chargeable with the reports which he had endeavored in vain to verify. The law of constructive notice can never be so

applied as to relieve a party from responsibility for actual mis-statements and frauds."

Converse vs. Blumrich, 14 Mich. 108-120.

The case of Dickey vs. Henarie, 15 Pac. 464, is in principle directly in point. The facts briefly were: Martin owned a leasehold interest in a building in Portland, Oregon. Martin sublet a portion of the building to Dickey for a cigar store, which sub-lease was in writing but not recorded. It gave to Dickey the *exclusive right* to sell tobacco and cigars in the whole of the building. Dickey was in possession of the portion he had leased. Creditors of Martin attached his interest in the building. At the sheriff's sale under the attachment Dickey gave notice to the sheriff and bidders that he had a sub-lease of the cigar store, which was in writing. The attaching creditors purchased at the sheriff's sale and took possession of the building, but recognized Dickey's sub-lease of the cigar store, but refused to recognize his *exclusive right* to the sale of tobacco and cigars in the whole building.

It is impossible to quote intelligently from the opinion without setting out the whole of it, but the court held the attaching creditor, who was the purchaser at the sale, was only charged with notice of the provisions of the written lease so far as they were stated by Dickey at the sale; that he was not put upon inquiry as to the contents of the writing for the reason that the party in possession of the instrument had stated to the purchaser what its provisions were and he had a right to rely on such sttaement.

In the case at bar the plaintiff in declaring on his contract set forth none of these provisions which could constitute the parties to it partners, and from which relation all his rights in the property against the Lukes, if any, must flow. There is no reference whatever to the provisions of the sixth, seventh, eighth and ninth clauses of the contract, which, as this court points out, are the only ones which constitute that relation.

It is a significant fact that the sheriff's return of the execution showing the sale to the Lukes, and the satisfaction

thereby of their judgment was filed in the Clerk's office on December 30th, 1903, and THE NEXT DAY on December 31st, 1903, the plaintiff amended his complaint, and for the first time exhibited the contract by attaching a copy thereto.

This was the first notice the Lukes ever had, either actual or constructive, of those provisions of the contract which constituted the parties to it partners, and that this was too late to affect the rights of the parties, even the Texas authorities relied on by plaintiff, fully agree.

In the court below the plaintiff relied upon the theory that the contract between Smith and Rainey, by constituting them partners in respect to the land in controversy, created a resulting trust in Rainey for the benefit of Smith.

If this argument were sound, it is inconsistent with the plaintiff's complaint and the judgment in the case, and must result in a reversal. If by reason of the fact that Smith advanced money to the partnership for the purchase of the land in controversy, it results that the one-third interest conveyed to Rainey is held by him in trust, it is so held in trust for the partnership, not for Smith. It would also result that the two-thirds interest conveyed to Smith is held by him in trust for the partnership and Smith's lien for advances is upon the whole property of the partnership and not upon the one-third interest conveyed to Rainey alone.

Smith vs. Rainey, 209 U. S. 53.

But the resulting trust theory is not only inconsistent with the pleadings and judgment in the case, but is inconsistent with the admitted facts.

The court will remember that, though this contract bears date March 20th, 1897, the same date the deed of the property to Smith and Rainey was executed and recorded, the Territorial Court found that the contract was not executed or delivered until April 29th, 1897. (Tr. folio 95).

Now it is well settled that a resulting trust must come into existence at the very moment of the passage of the title of the property and that no subsequent agreement can create such trust. The following quotation from Perry on

Trusts would seem to indicate that the plaintiff must seek his remedy by other theories than that of a resulting trust:

> "The trust must result, if at all, at the instant the deed is taken, and the legal title vests in the grantee. No oral agreements, and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself. Thus if two agree to purchase and one furnishes all the money and takes the title to himself, no trust results to the other. AND SO IF TWO AGREE TO PURCHASE AND ONE PAYS THE WHOLE CONSIDERATION MONEY AND THE TITLE IS TAKEN TO THE TWO, NO TRUST RESULTS TO THE ONE WHO PAID THE WHOLE. He can only enforce repayment of one-half the consideration money."

3rd Ed. Perry on Trusts. Sec. 133.

This is exactly our contention. What Smith has, and what the United States Supreme Court says he has, is a LIEN. He is a lien holder, not a CESTUI QUE TRUST. He is therefore not within the doctrie of the Texas cases relied on by counsel for plaintiff, which are cases in which the party held not to be affected by the recording acts, was clearly a CESTUI QUE TRUST and not a lien holder. The plaintiff is the holder of a secret lien, created by an unrecorded instrument in writing—good against Rainey, but void as to all creditors and subsequent purchasers without notice by virtue of par. 749, Rev. Stat. Ariz., and is clearly within the construction of that statute by the Supreme Court of Texas.

Grace vs. Wate, 45 Tex. 522.
Simpson vs. Chapman, 45 Tex. 566.
Murphy vs. Smith, 50 T. W. 1042.
Grimes vs. Hobson, 46 Tex. 419.
Lewis vs. Johnson, 68 Tex. 448.
Stephens vs. Keating, 17 T. W. 37.

Cent. City, etc., vs. Waco Bldg. Assn., 64 S. W. 998.
Turner vs. Cochran, 63 S. W. 153.
Meek vs. Skeen, 60 Fed. 325.
Stevenson vs. Texas R. R. Co., 105 U. S. 707.
Pugh vs. Highley, 152 Ind. 258.

We concede that Section 749 of our statute is, in all its essentials, taken from the Statutes of Texas.

It will be noted that the statute makes all mortgages *whatsoever* void as to all creditors and as to subsequent purchasers for value without notice. By this statute *all* creditors, with or without notice, are protected against unrecorded mortgages, but as to subsequent purchasers only those are protected who are purchasers for value without notice.

This statute was construed by the Supreme Court of Texas in 1876, prior to its adoption by this Territory, in a case in which the only point in issue was whether the creditor who had no notice of the unrecorded instrument when he acquired his lien, but did have such notice before the sale, was protected by the statute. And this case was reviewed by the Supreme Court of the United States in 1881 in construing the same statute, and the construction placed upon it by the Texas Court is specifically approved and adopted.

Grace vs. Wade, 45 Tex. 522.
Stevenson vs. Tex. R. R. Co., 105 U. S. 703.

In the Texas case above cited the court, after construing the statute referred to, says:

"Now, if the unrecorded instrument cannot take effect, but is void as to creditors, it is absurd to say that the right acquired by the creditor by his lien, not merely to purchase himself, but to have the land sold in open market, when once secured, can be taken away by the subsequent record of such instrument, or that the party holding such lien can, by subsequent notice, be precluded from the full benefit of his lien for the satis-

faction and discharge of his demand, except by becoming himself the purchaser."

And this language is quoted with approval by the Supreme Court of the United States in the case above referred to.

And the Texas Court in the case above cited further says:

> "The statute, in plain and unmistakable language, says that unrecorded conveyances, whether by deed or bond, are void as to two classes of persons, viz.: 'all creditors' and 'subsequent purchasers for valuable consideration without notice.' Now, it will be noted that there is a marked distinction between these two classes of persons for whose benefit the statute was enacted; for while such unrecorded instruments are void as to 'all creditors,' they are only so as to 'purchasers for a valuable consideration and without notice.' And lest there might be any uncertainty in its proper construction, and to guard against all danger of confounding the two classes, as to whom such instrument was declared void, without making any qualification or restriction as to creditors, it enacts, that as to the parties to such instruments, and their heirs, and all subsequent purchasers with notice, and without valuable consideration, they shall be valid."

To quote further from these cases would only tend to unnecessarily lengthen this brief.

But counsel now seek to avoid the force of these decisions by receding from his construction of the instrument declared on as shown in the complaint and his former briefs, and now declaring that the instrument is not a mortgage, but that it creates a trust estate in Rainey, and that the Texas Courts have declared that trust estates are not affected by the provisions of Par. 749, and in support of this contention counsel relies on the following Texas cases:

Blankenship vs. Douglas, 26 Tex. 226.
Ayres vs. Duprey, 27 Tex. 593.
Senter vs. Lambeth, 59 Tex. 259.

The first two cases above cited were decided prior to

Grace vs. Wade and are commented upon in that case.

In Blankenship vs. Douglas, one J. J. Blankenship bought real estate for David Blankenship with money in his hands belonging to David Blankenship and took the title in the name of J. J. Blankenship, and the court held that thereby a resulting trust arose and J. J. Blankenship held the title in trust for David Blankenship, and that the property was not subject to execution for the debts of J. J. Blankenship, but would be subject to execution for the debts of David Blankenship.

In Ayres vs. Duprey, the court points out the difference in the protection afforded by the statute to a "creditor" and a "purchaser." It has no reference whatever to trusts or equities, and has no bearing on the case.

The case of Senter vs. Lambeth, 59 Tex. 259, is much relied on by counsel for plaintiff, but we think it supports our contention and clearly points out the only class of trust estates which are held not to be within the provisions of the recording statute and the reason therefor. The contest in this case was between the holder of a vendor's lien not evidenced by any writing whatever and an attaching creditor without notice at the time of the attachment, but with notice at the time of the sale, and the court says:

> "The evidence of the vendor's lien in this case was not recorded, nor was it, in the form in which it existed (being the lien springing by operation of law out of the transaction between the parties) SUSCEPTIBLE OF REGISTRATION."
>
> (Here the court cites Texas cases holding attachment liens superior to unrecorded liens or conveyances.)
>
> "These decisions only apply to cases where the third party to be affected by the unrecorded conveyance acquired thereby the legal title; or WHERE HIS RIGHT OR INTEREST IS REPRESENTED BY SOME WRITTEN INSTRUMENT, THAT IS REQUIRED OR PERMITTED BY LAW TO BE RECORDED, AND WHICH HE HAS NEGLECTED TO RECORD, and of which the judgment creditor had no

actual notice at the date of the acquisition of his lien.

"The court has never held that the doctrines above announced applied to cases where the rights of a third party, as in this case, for example, claiming through or under the judgment debtor, were purely equitable in their character, AND WHICH WERE NOT IN THEIR NATURE SUSCEPTIBLE OF REGISTRATION, when actual notice of such equitable title was brought home to the purchaser before the sale and purchase."

Here the court points out the basis and prescribes the limit of the doctrine of the protection of equitable estates from the operation of the recording acts. The basis is the absolute impossibility of placing the trust estate of record, for the reason that it is not susceptible of recording because there is no instrument in writing creating it, but it arises by operation of law. But, as the court puts it, "where his right or interest is represented by some written instrument that is required or permitted by law to be recorded, and which he has neglected to record," the decision in Grace vs. Wade applies, and the recording act affords protection to *all* creditors, whether they have notice or not.

We think therefore that under the Texas doctrine, though it be the only state that exempts *any* trust estates or equitable rights from the operation of the recording acts, the equitable mortgage or lien claimed in this case, being evidenced by an instrument in writing susceptible of acknowledgment and registration, and which our statutes permit to be recorded (95 Pac. 180, Ariz.), and which the plaintiff has neglected to have acknowledged or recorded, is subject to the lien of an attaching creditor, whether he have notice of such instrument before the sale or not.

In support of this position we rely on the following authorities:

Grace vs. Wade, 45 Tex. 522.
Senter vs. Lambeth, 59 Tex. 259.
Stephenson vs. Tex. R. R. Co., 105 U. S. 703.
Mansfield vs. Johnson, 40 So. 196.
Wahrenberger vs. Waide, 45 Pac. 518.
Houston vs. McCluney, 8 W. Va. 135.

The last case cited (8 W. Va. 135) is so nearly parallel with the case at bar as to its facts, and is so well reasoned, that we trust the court will give it careful attention.

There is no force in the argument of counsel that the instrument was not acknowledged and therefore could not be recorded.

That it was not acknowledged was the fault of appellee and not of appellant Luke. Moreover the Supreme Court of Arizona has decided that an unacknowledged contract is entitled and permitted to be recorded under our statutes.

Nat. Cash Reg. Co. vs. Bradbury, 95 Pac. 180.

IV.

We desire to call the attention of the court to one other point only.

The court will note that the plaintiff has declared on the written instrument, and in his pleading has characterized it as creating a mortgage lien upon the property of Rainey which he asks to have foreclosed. But to evade the provisions of Par. 749 regarding the recording of mortgages, it is now claimed that the plaintiff's lien is not dependent upon the written instrument, but exists as a partner's lien independent of the writing. And this, notwithstanding that the Supreme Court of the United States has declared that "taking the instrument as a whole, we are of opinion that *it* (the instrument) gives the appellant a lien. Whether the defendants nevertheless may not be entitled to priority, is not before us now."

Smith vs. Rainey, 209 U. S. 56.

Now, if the lien exists by virtue of the writing only, it is a mortgage lien and may be foreclosed. But if the lien now claimed by Smith exists independent of the writing, then it must be simply the partner's equitable lien. This equitable lien is not a specific lien of one partner upon that portion of the partnership assets standing in the name

of one of the other partners, but is a general lien upon all the assets of the partnership. It is in fact only a right to have all the partnership assets applied to the payment of the partnership debts, among which may be a debt due to one of the partners. The partner's lien cannot be enforced against one of the individual partners, but can only be availed of by a dissolution of the partnership, an accounting between the partners, and the sale of all the partnership assets.

We call attention to this matter only for the purpose of showing that the plaintiff Smith has pursued his remedy in this case on the theory that the lien he claims is not the equitable lien upon all the partnership assets growing out of the partnership relation, but a specific lien upon a particular item of alleged partnership property standing in the name of the individual partner. Therefore the lien for which the plaintiff has sought and obtained a decree of foreclosure, is a specific lien on specific property, created by an instrument in writing permitted and required to be recorded, and which the plaintiff has neglected to record, and is directly within the terms of the decisions of the Supreme Court of Texas construing Sec. 749 of our Revised Statutes of 1901.

In this connection, too, we respectfully suggest that the decision of the Territorial Court in this case does not seem to be in accord with former holdings of that court.

In the case of Baker vs. Fleming, this court had under consideration the question whether the doctrine of vendors' lien should obtain in this Territory. Or, as stated by the court, "whether a grantor of real estate by absolute conveyance has an implied equitable lien thereon for the unpaid purchase money. If such a lien arises at all, it must, on principle prevail alike against the grantee himself and all subsequent purchasers with notice."

In denying the existence of such lien this court quotes with approval the following language used by Chief Justice Marshall in Bailey vs. Greenleaf, 7 Wheat. 46:

> "It is a secret, invisible trust, known only to the vendor and vendee, and those to whom it may be com-

municated in fact. To the world, the vendee appears to hold the estate devested of any trust whatever, and credit is given to him in the confidence that the property is his own in equity as well as law. A vendor, relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien."

And again the same court quotes with approval the following language by Judge Gray (afterward of the United States Supreme Court) in a Massachusetts case in which the question of secret (vendor) liens was under consideration:

"If no third person has acquired any rights in the land by *bona fide attachment or conveyance,* the original vendor may secure payment of the debt due him for the purchase money by the usual attachment or mesne process. If any third persons has acquired rights in the property, there is no reason why equity, any more than the common law, should interpose to defeat them."

And in expressing its opinion in the case cited, the same court says:

"After giving to the question the deliberate consideration which its importance demands, we are forced to the conclusion that this principle of an implied lien for purchase money can have no just application in this Territory. It is opposed to the policy of our legislation, which aims to make the title to real estate as simple and easily understood as possible, and to facilitate its transfer and improvement by discouraging all secret or latent equities, and requiring conveyances and encumbrances thereof to be made matters of public record. Here, our attachment law readily permits a debt to become a lien before judgment, and debts generally are a lien upon the lands of decedents. The doctrine

being thus repugnant to our registration law, ill-suited to our condition, and by no means essential to the interests of justice, we ought not to adopt it."

Baker vs. Fleming, 6 Ariz. 418.

It seems to us that the decision of the court in the case at bar is incompatible with the principle announced in the Baker case.

The argument that the sheriff, in levying the attachment in this case, did not levy on the property, or Rainey's one-third interest in it, but only on "all the right, title and interest" of Rainey ,in the property, the levy only attached to the real interest of Rainey, instead of to the title in him disclosed by the record title, is futile. It is fully answered by the court in the case of Meek vs. Skeen, 60 Fed. 325, above cited, and no further answer or argument is necessary.

For the convenience of the court we append a reference to the Sections of the Statutes of the Territory of Arizona referred to in this brief.

Respectfully submitted,
WALTER BENNETT,
Attorney for Frank and John Luke, Appellants.

APPENDIX.

The following is copy of the Sections of the Statutes of Arizona referred to in this brief and affecting the questions therein discussed:

Paragraph 358.

The execution of the writ of attachment upon any property of the defendant subject thereto, unless the writ should be quashed or otherwise vacated, shall create a lien from the date of such levy on the real estate levied on, and on such personal property as remains in the hands of the attaching officer, and on the proceeds of such personal property as may have been sold.

PARAGRAPH 749.

All bargains, sales and other conveyances whatever, of any lands, tenements and hereditaments, whether they may be made for passing any estate of freehold or inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged and filed with the recorder, to be recorded, as required by law, or where record is not required deposited and filed with the recorder; but the same, as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof, or without valuable consideration, shall nevertheless be valid and binding.

PARAGRAPH 2703.

If any person shall do or transact business as a merchant or trader, with the addition of the words agent, factor, or company, or and Co., or words of like significance or import, and shall fail to disclose the name of his principal or partner or other person who may be interested in such business by a sign in letters easy to be read, placed conspicuously at the place where such business is transacted; or if any person shall transact business in his own name, without any such addition, all the property, stock, money and choses in action used or acquired in such business, except such property as may be exempt from execution, shall, as to the creditors of any such person, be liable for his debts, and be, in all respects, treated in favor of his creditors as his property: *Provided*, That this title shall not apply to co-partners who have complied with the provisions of title 51 of the Revised Statutes of Arizona.

TITLE LI.

PARTNERSHIPS.

3520. (Section 1). (Except as otherwise provided in the next section) every co-partnership transacting business

in this Territory under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the Recorder of the County in which such place if business is situated a certificate stating the names in full of all the members of such partnership and their place of residence.

3521. (Sec.) A commercial or banking partnership established and transacting business in a place without this Territory may, without filing the certificate prescribed herein, use in this Territory the partnership name used by it there, although it be fictitious or do not show the names of the persons interested as partners in such business.

3522. (Sec. 3). The certificate filed with the Recorder, as provided herein, must be signed by the partners and acknowledged before some officer authorized to take the acknowledgment of conveyances of real property. Persons doing business contrary to the provisions of this title shall not maintain any action upon or on account of any contract made *of* transactions had in their partnership name in any court of this Territory until they have first filed the certificate herein required.

3523. (Sec. 4). On every change in the members of a partnership transacting business in this Territory under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business, except in the cases mentioned herein, a new certificate must be filed with the Recorder, as required by this title, on the formation of such partnership.

3524. (Sec. 5). Every County Recorder must keep a register of the names of firms and persons mentioned in the certificates filed with him pursuant to this title, entering in alphabetical order the names of every such partnership and of each partner therein.

(Took effect September 1, 1901.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. 150

FRANK LUKE AND JOHN LUKE, APPELLANTS,

vs.

JESSE HOYT SMITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF CASE.

This is an action commenced by the above named appellee against William J. Rainey and against the above named appellants, to foreclose a lien upon six hundred (600) acres of land in the vicinity of Phoenix, Arizona. The action was commenced in the District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County, on or about the 18th day of July, 1903. An amended complaint was filed in the action on December 31st, 1903 (Transcript of Record, page 9). The appellants demurred to this complaint; the demurrer was sustained by the District Court of the Territory of Arizona and on appeal to the Supreme Court of Arizona the judgment of the District Court was affirmed. The plaintiff and present appellee appealed from the judgment of the Supreme Court of Arizona to this Court and its decision was reversed by this Court on March 16, 1908 (Smith vs. Rainey, 209 U. S. 53). The action was subsequently tried in the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, and a judgment was entered in favor of the appellee and against said William J. Rainey, for the sum of Twenty-eight

Thousand Two Hundred Twenty-four Dollars and Two Cents ($28,224.02), together with interest and costs. The court also adjudged the lien of the appellee to be prior to that of the appellants and a judgment of foreclosure in the usual form was entered against said Rainey and the appellants (Transcript of Record, pages 17 and 18).

The appellant appealed from that judgment to the Supreme Court of Arizona, which Court affirmed the judgment of the lower court (Transcript of Record, pages 31 to 37, inclusive).

From that judgment this appeal was taken.

The statement of facts required by the Act of Congress of April 7, 1874, 18 Stat. 27, c. 80, will be found on pages 47 to 53, inclusive, Transcript of Record. We shall not reprint in full the statement of facts in this brief, but desire to call the attention of the Court to several mis-statements regarding the facts contained in the appellants' brief.

On page 4 of the appellants' brief we find the statement that on the 20th day of September, 1901, the Lukes and Rainey entered into a contract, through which Rainey became obligated to the Lukes to pay them some Twenty-five Hundred Dollars ($2,500). We find no such statement in the certificate of facts contained in the printed record.

On page 7 of appellants' brief, we find the following statement:

> "On the 28th day of November, 1903, the demurrer "of the defendants Luke to the amended complaint was "sustained by the District Court, and that ruling was "subsequently approved by the Supreme Court of the "Territory *and by the Supreme Court of the United "States.*"

The fact is that the ruling was expressly reversed by this Court. (Smith vs. Rainey, 203 U. S. 56.)

The facts found and certified to this Court by the Supreme Court of Arizona, stated briefly, are as follows:

First. That on March 20th, 1897, the appellee and Rainey purchased the premises described in the complaint, for the sum of Eighteen Thousand Dollars ($18,000), every dollar of which was paid by the appellee, and that in and by the deed of conveyance, under which said purchase was made, an undivided two-thirds (2/3) of the premises were granted to the appellee and an undivided one-third (1/3) thereof to Rainey; and that the deed of conveyance was duly recorded in the Recorder's office of Maricopa County, Arizona.

Second. That in the month of April, 1897, an agreement in writing was entered into, by and between the appellee and

Rainey, which agreement recited the purchase of the premises in question by the appellee and Rainey; the payment of the entire purchase price by the appellee and the purpose of the appellee and Rainey to improve, plat and sell the premises at a profit.

It was provided in said written agreement that the improvement of said tract should be commenced not later than January 1st, 1898.

That the improvements should consist of surveying and platting the entire tract into lots, opening up and grading of all streets, the planting of suitable shade, ornamental and fruit trees, and such other improvements as might be agreed upon between the parties.

That appellee, in addition to the purchase price of Eighteen Thousand Dollars ($18,000), should advance all sums necessary for the improvement of said premises and also all such as might be required for the running and incidental expenses in the undertaking, including taxes, irrigation charges, marketing said lots and the reasonable and necessary expenses of Rainey from Cleveland, Ohio, to Phoenix, Arizona, and return, and his living expenses when in Arizona engaged in business relating to said property.

That all money advanced by the appellee in said purchase as well as all that might be thereafter advanced, should be considered and treated as a loan or loans by him and should be paid to him as rapidly as possible from the receipts from the sale or sales or other income of said property, until the sum should be fully paid, with interest at six per cent (6%) per annum, and before any division of profits should be made.

That if, at the date of five years from the making of said agreement, the appellee should not have been fully repaid, said loans, with interest out of the proceeds or income of said premises, said Rainey agreed that he would on demand thereafter pay to said appellee the one-third of all such loans then unpaid, including interest thereon.

That Rainey should have the general management of said tract, including the improvements thereof, provided that no contract or other obligations on account of said property, exceeding in the aggregate the sum of Five Thousand Dollars ($5,000) should be entered into without the previous written consent of said appellee, and no contract for the sale of any such lots should be made except at prices and on terms to be agreed upon between the appellee and said Rainey, and that Rainey should from time to time give to said appellee true accounts of all transactions relating to the business and full information in regard to all matters which should come into

his hands or knowledge respecting such business, and should give due regard to his wishes and directions respecting same.

That said Rainey should keep proper books of account relating to said business, which should be at all times open to inspection of appellee and render appellee monthly statements showing all contracts made and all disbursements and receipts, and showing all the assets and liabilities of the partnership.

That Rainey, in said agreement, agreed to accept the general management of said tract of land without other consideration or remuneration, excepting only his one-third (1/3) share in the net profits of such business as provided in said agreement.

That after the repayment to said appellee of the purchase price and all advances, the appellee should be entitled to two-thirds (2/3) of the net profits and said Rainey to one-third (1/3) thereof. The losses, if any, to be shared in the same ratio.

That the agreement was entered into for the purpose of stating explicitly the terms of co-partnership, on which the appellee and said Rainey joined in the purchase, improvement and sale of said tract and that each would fulfill in good faith, to the best of his ability, the articles contained in said agreement.

Third. That on November 28th, 1898, said Rainey executed and delivered to one Anthony G. Hubbard, a mortgage upon an undivided one-third interest in said premises to secure the payment of Three Thousand Dollars ($3,000), which mortgage was duly recorded in the office of the County Recorder of Maricopa County, Arizona, and was thereafter released and discharged of record by the mortgagee.

Fourth. That at various times between March 20th, 1897, and May 23rd, 1903, appellee advanced, in pursuance of said contract, the further sum of Thirty-two Thousand Four Hundred Seventy-three Dollars and Thirty-five Cents ($32,473.35), and that one-third (1/3) part of such payments and advances, so made by appellee, with interest from the date of the several payments and advances at the rate of six per cent (6%) per annum amounts to Twenty-one Thousand Seven Hundred Seventy-two Dollars and Seventeen Cents ($21,772.17), which sum was due to appellee from Rainey under the terms of said contract on May 23, 1903. That since May 23rd, 1903, and prior to November 28th, 1903, said appellee advanced the further sum of One Thousand Eighty-five Dollars ($1,085); that one-third (1/3) thereof, together with interest thereon, from the 28th day of November, 1903, was on the trial of this action due from said Rainey to said appellee, and that the total amount due from said Rainey to said appellee for principal

and interest, under the terms of said contract, is the sum of Twenty-eight Thousand Two Hundred Twenty-four Dollars and Two Cents ($28,224.02); and that no part thereof has been paid.

Fifth. That appellee has complied with, and fulfilled all the terms and conditions of said contract on his part to be performed; that said Rainey has failed and neglected to perform and carry out the terms and conditions of said contract to be performed on his part.

Sixth. That on June 11th, 1902, the record title to an undivided one-third (1/3) interest in the premises in question was in said Rainey; than on that date the appellant commenced an action in the District Court of Maricopa County, Arizona, against said Rainey to recover the sum of Twenty-five Hundred Dollars ($2,500) with interest thereon from April 1, 1902, and in said action levied an attachment upon Rainey's interest in the premises in question.

That on June 11th, 1903, the appellants recovered a judgment in said action against said Rainey for the sum of Twenty-five Hundred Dollars ($2,500) with interest from April 1, 1902, together with the costs of the action, and which judgment foreclosed the lien of the attachment levied upon said premises in said action.

That on August 6th, 1903, an order of sale was issued directed to the Sheriff of Maricopa County, Arizona, commanding him to seize and sell, as under execution, the premises described in complaint to satisfy said judgment; that said Sheriff did seize the premises and property and after due notice sold said premises to the appellants for the full amount of their judgment with costs.

That thereafter, and on June 20th, 1904, no redemption of said premises from said sale had been made, and on that date the Sheriff executed, acknowledged and delivered to the appellants a Sheriff's Deed for said premises.

Seventh. That the contract between the appellee and Rainey attached to this second amended complaint as Exhibit "A" was never filed for record in the Recorder's office of Maricopa County, Arizona, and that neither of said appellants had any knowledge or notice of the existence of said contract at any time prior to the filing of the plaintiff's second amended complaint herein, saving and excepting such notice, actual or constructive, as was imparted to them by the pleadings in this cause, or which the law imputed to them from such pleadings.

The appellants have assigned five errors upon which they rely for a reversal of the judgment in the case at bar, namely:

I.

The Court erred in holding W. J. Rainey to be a trustee for Smith, of an undivided one-third of the premises in controversy.

II.

The Court erred in holding Smith's alleged partner's lien to be a lien on Rainey's one-third interest in the premises in controversy, and in holding such lien to be superior to the Luke's attachment lien thereon.

III.

The Court erred in holding that the appellants had notice of Smith's partner's lien prior to their purchase of the premises in controversy at the sheriff's sale, and that such notice rendered such purchase subject to such alleged partner's lien.

IV.

The Court erred in holding that paragraph 2703 Rev. Stat. Ariz. 1901, is not applicable to the facts in this case.

V.

The Court erred in affirming the decree of the trial court in directing the sale of Rainey's one-third interest in the property in controversy in satisfaction of the claim of Smith against the alleged partnership of Smith and Rainey.

We will consider these assignments of error in the order named.

ARGUMENT.

FIRST.

The Court did not err in holding W. J. Rainey to be a Trustee for Smith of an undivided one-third (1/3) *of the premises in controversy.*

That the premises in question were partnership property is *res adjudicata* in the case at bar. (Smith vs. Rainey, 209 U. S. 53.)

On behalf of appellee, we insist:

That by reason of the partnership relation, the legal title to the entire tract was held by Smith and Rainey in trust for the benefit of the partnership and the satisfac-

tion of firm creditors, and all claims between the partners before any portion of the interest of either partner could be reached by his individual creditors.

"Where the conveyances are to both partners, they "are in law tenants in common, presumptively equal "owners; but in equity, whether the title be in them "jointly or in one of them, the property is assets, "amenable to creditors, and the surplus is to be dis- "posed of between them on settlement of the partner- "ship account. It is, therefore, a general principle, "that each partner has a lien on the partnership prop- "erty, not only for the amount of his interest, but for "moneys advanced beyond his contribution to the cap- "ital, to the uses of the co-partnership. And this "lien attaches on real estate held for partnership pur- "poses as well as on the joint personal estate."

Whitney vs. Cotton, 53 Miss. 689, 691-692.

"And it appears to us, that considering the nature "of a partnership, and the mutual confidence in each "other, which that relation implies, it is not putting "a forced construction upon their act and intent, to "hold that when property is purchased in the name "of the partners, out of partnership funds and for "partnership use, though by force of the common law "they take the legal estate as tenants in common, yet "that each is under a conscientious obligation to hold "that legal estate, until the purposes for which it was "so purchased are accomplished, and to appropriate "it to those purposes, by first applying it to the pay- "ment of the partnership debts, for which both his "partner and he himself are liable, and until he has "come to a just account with his partner. Each has "an equitable interest in that portion of the legal es- "tate held by the other, until the debts, obligatory on "both, are paid, and his own share of the outlay for "partnership stock is restored to him. This mutual "equity of the parties is greatly strengthened by the "consideration, that the partners may have contrib- "uted to the capital stock in unequal proportions, or "indeed that one may have advanced the whole. Take "the case of a capitalist, who is willing to put in "money, but wishes to take no active concern in the "conduct of business, and a man who has skill, ca- "pacity, integrity and industry to make him a most "useful active partner, but without property, and they "form a partnership. Suppose real estate, necessary

"to the carrying on of the business of the partnership "should be purchased out of capital stock, and on "partnership account, and a deed taken to them as "partners, without any special provisions. Credit is "obtained for the firm, as well on the real estate as "the other property of the firm. What are the true "equitable rights of the partners, as resulting from "their presumed intentions, in such real estate? Is "not the share of each to stand pledged to the other, "and has not each an equitable lien on the estate, re- "quiring that it shall be held and appropriated, first "to pay the joint debts, then to repay the partner who "advanced the capital, before it shall be applied to "the separate use of either of the partners?"

Dyer vs. Clark, 46 Mass. 562, 577-578.

"The lien of a partner, for a balance (on the part- "nership accounts) is not an incident of the legal title "to the effects; but results from the partnership, and "is not affected by the mortgages of either partner on "his share."

Hodges vs. Holeman, 1 Dana 50 (Ky.)

"Partners in lands have an equity against each "other, for the purpose of producing equality among "themselves; and this equity fastens itself, and is a "lien, upon their respective interests in the partner- "ship lands, of which neither can be deprived by the "other, or a creditor of his, or purchaser from him "with notice."

Williams vs. Love, 2 Head 80.

"The law now seems to be well settled, that an exe- "cution may be levied upon the interest of a partner "in the firm property, and it may be sold for payment "of the judgment. But the purchaser only acquires "the interest of the debtor subject to the settlement of "the debts and liabilities of the firm. It can only hold "such interest as a partner has on a final settlement "and account of the affairs of the firm, and the rights "of the partners on such accounting."

Rainey vs. Nance, 54 Ill. 27, 36-37.

"Each partner has a lien on the funds for his share "of the surplus, as well as for his indemnity against "the joint debts."

Matlock vs. Matlock, 5 Ind. 403, 404.

Black vs. Bush, 7 B. Mon., 210.

Buffum vs. Seaver, 16 N. H., 160.

Betts vs. Letcher, 1. S. Dak. 182.

Boyce vs. Coster, 4 Stroble Eq., 25.

Boyer vs. Elliott, 7 Humph., 204.

"A partner has a lien upon all the property of the "partnership for the balance due him on a final settle- "ment between the partners. The basis of this lien is "an implied trust or pledge."

Wright vs. Wright, 59 How. Pr. 176, 186.

"A partner in a dissolved firm has a lien on part- "nership realty for the amount due him on general "settlement of the partnership account, superior to "the execution lien of a post-dissolution creditor of "another member of the firm, though it had been dis- "solved for five years, and the title stood in the names "of the individual members of the firm."

Lane vs. Jones, 9 Lea 627.

"Each member of the firm has a lien upon the part- "nership property for the debts due the creditors of the "concern, and for moneys advanced by him for its use, "which he may enforce in equity even if there has been "no agreement among the partners that such lien shall "exist."

Duryea vs. Hiram Burt, et al., 28 Cal. 569.

Dillworth vs. Mayfield, 36 Miss. 40.

Ives vs. Miller, 19 Barb. 200.

"Each partner has a specified lien upon the partner- "ship stock, not only for the amount of his share, but "for moneys advanced by him beyond that amount, for "the use of the partnership."

Pierce vs. Wilson, 2 Ia. 20.

Evans vs. Hawley, 35 Ia. 83.

"In law partnership real estate is held by the part- "ners as tenants in common, but in equity is dealt with "as partnership property."

Peck vs. Fisher, 7 Cush. 387.

Lowe vs. Alexander, 15 Cal. 296.

"And, in the view of equity, it is immaterial in "whose name the legal title of the property stands— "whether in the individual name of one copartner, or

"in the joint names of all; it is first subject to the pay-
"ment of partnership debts, and is then to be distrib-
"uted among the copartners according to their respec-
"tive rights. The possessor of the legal title in such
"case holds the estate in trust, for the purpose of the
"copartnership."

Dupuy vs. Leavenworth, 17 Cal. 262, 268.

Dyer vs. Clark (5 Met. 662) and *Dupuy vs. Leavenworth* (17 Cal. 262) are cited and approved by the Supreme Court of the United States in a case in which the Court, in speaking of the interest of a partner in the firm real estate, says:

"It is an equitable right accompanied by an equit-
"able title. It is an interest in the property which
"courts of chancery will recognize and support. What
"is that right? Not only that the court will, when
"necessary, see that the real estate so situated is ap-
"priated to the satisfaction of the partnership debts,
"but that for that purpose and to that extent, it shall
"be treated as personal property of the partnership,
"and like other personal property pass under the con-
"trol of the surviving partner. This control extends to
"the right to sell it, or so much of it as may be neces-
"sary to pay the partnership debts, or to satisfy the
"just claims of the surviving partner."

Shanks vs. Klein, 104, U. S. 18, 22.

"When one of two partners purchases real estate
"with partnership funds, but takes title in his own
"name, and takes possession, his possession is the pos-
"session of both, and a trust results in favor of his
"partner."

Riddle vs. Whitehill, 135, U. S. 621.

Joint purchasers of land, where one party pays more than his share, stand in respect to the equity between them as partners, and the party paying the excess has the right to be reimbursed out of the land, and also to have debts paid for money jointly borrowed to pay on the land, before the other party *or his attaching creditor* can have any part of the proceeds.

Furman vs. McMillian, 2 Lea 121.

"But the claims of the creditors of the firm and
"of the other copartners, are only in the nature of an
"equitable lien on the partnership property, for the se-

"curity, in the one case of the demands of the credi-
"tors, and in the other, of the remaining copartners,
"for any balance found to be due to them on a settle-
"ment of the partnership affairs. This lien can only
"be asserted in a Court of equity, which has the ade-
"quate machinery for winding up the partnership,
"marshaling the assets and ascertaining the debts due
"from the firm, and the balances, if any, due to the
"several copartners."

Stokes vs. Stevens, 40 Cal. 391, 394.

The right of the appellee to have his advances paid out of the property in question is therefore as held in Shanks vs. Klein (supra) "An equitable right accompanied by an equitable title.

"It is an interest in the property which Courts of
"Chancery will recognize and support."

The cases above cited conclusively demonstrate that the appellee had a lien upon the premises in question which attached on March 20, 1897, the date of the purchase of the premises by the appellee and Rainey.

Second.

The Court did not err in holding Smith's alleged partner's lien to be a lien on Rainey's one-third interest in the premises in controversy, and in holding such lien to be superior to the Luke's attachment lien thereon.

As we have hereinbefore shown, the plaintiff acquired a lien upon the premises in question which attached on March 20th, 1897, the date of the purchase of the premises by the appellee and Rainey. The appellant's lien did not attach until June 11th, 1902, the date of the levy of the appellant's writ of attachment upon said premises. (Printed Record, pages 51-52.) The lien of the appellee is therefore prior to that of the appellants, unless the appellee has lost his rights either by virtue of some express statute, or by some act which estops him from asserting the priority of his claim as against appellee.

We understand counsel for the appellants to claim that the appellant's lien is prior to appellee's title

First: Because of the Recording Act of Arizona, Rev. Stats. 1901. *Par.* 749, *and the failure of appellee to record his partnership agreement.*

Second: Because, as appellant claims, appellee with notice and without protest permitted Rainey to mortgage the property, and otherwise publicly treat it as his own undivided property.

The interest of appellee in the premises in question is not such an interest as is governed by the registration act of the Territory of Arizona. That act provides:

> "All bargains, sales and other conveyances whatever of any lands, tenements and hereditaments, whether they may be made for passing any estate of freehold or inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged and filed with the recorder, to be recorded as required by law, or when record is not required deposited and filed with the recorder; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof, or without valuable consideration, shall nevertheless be valid and binding."

This act is taken verbatim from the statutes of the state of Texas. Having been adopted from that state, the legislature is presumed to have adopted with it the interpretation of it as given by the Supreme Court of that state.

Gold vs. Sotelo, 8 Arizona, 85, 92.

This registration act has been repeatedly construed by the Supreme Court of the state of Texas and has always been held not to apply to a mere equitable interest. In a case decided by that Court in 1862, the Court used the following language:

> "It seems to be well settled that a judgment lien on the land of a debtor is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment. And Courts of equity, it is said, will protect the equitable rights of third persons against the legal lien, and will limit that lien to the acual interest which the judgment debtor has in the estate. (4th Paige's Chancery Rep., pages 14 and 15, and cases cited.) This doctrine is qualified by the registration laws of particular states, prescribing the effect of unrecorded conveyances and mortgages upon the rights of purchasers and creditors. And although, in the present instance the lien of the judgment recorded by Mullins would prevail over the un-

"registered deed executed by J. J. Blankenship to "David Blankenship, on the 7th of November, 1856, un- "less it were shown that Mullins had 'actual notice or "reasonable information' of said deed, this is so only "by virtue of our statute of the 5th of February, A. D. "1841. If the property in controversy was purchased "by John J. Blankenship with the funds of David "Blankenship, and for him, then the equitable estate "in the land was in David Blankenship, and upon proof "of the facts, the land might have been sold under exe- "cution for the debts of David Blankenship, and the "purchaser could have maintained his action against "John J. Blankenship to compel a conveyance of the "legal title. This kind of an equity is beyond the con- "templation of our statute of registration respecting "the rights of creditors. It is true that a purchaser of "the estate, under these circumstances, from John J. "Blankenship, in good faith, that is to say, without "notice, and for a valuable consideration, would take "the estate discharged of the equity of David Blanken- "ship. But it is settled that one who acquires a judg- "ment lien, although without notice, is not to be re- "garded in the light of a purchaser and entitled to a "preference over prior equities."

Blankenship vs. Douglas, 26 Tex., 225-228, 229.

The doctrine of this case has been, as we shall show, adhered to in Texas by an unbroken line of decisions.

"The judgment lien upon which the sheriff sold the "land was no better than the title by which the judg- "ment debtor held it; and a purchaser at such judicial "sales takes the land subject to all the equities which "are against it, and can derive no better title than that "which was held by the judgment debtor. That is all "the sheriff can sell or the vendee buy. But A. C. "Whatley had only the legal title in trust for his father "and sister, and the purchaser at sheriff's sale took "nothing. * * * *

"A resulting trust is protected against the opera- "tion of the registration laws."

Oberthier vs. Stroud, 33 Tex. 522-524.

"In the year 1856, the plaintiff and defendant be- "ing man and wife, the defendant made and delivered "to his wife his promissory note for the sum of $1,800, "to secure the payment of which, he, at the same time,

"executed a mortgage upon four hundred and fifty "acres of land, situated in the county of Fayette. The "mortgage was not recorded until the first Tuesday of "October, 1868, on which day the lands described in "the mortgage were sold upon execution, to satisfy a "judgment rendered at the November term, 1865, in "favor of one J. H. Gay against L. F. Price, the appel- "lee. The mortgage was recorded before the hour of "sale, and the appellant gave personal notice to Cole, "the purchaser, of the existence, record and nature of "her mortgage." Held Cole not an innocent purchaser without notice.

Price vs. Cole, 35 Tex. 461-470, 471.

"If, as claimed, the land conveyed by Avery to P. "R. Trial and wife was in part paid for with trust "funds held by Trial for the appellees, and to that ex- "tent he purchased the land for them, that would vest "in the appellees an equitable right as would sustain "an action by them against Trial to compel a convey- "ance of the legal title.

"An equitable right of this character is not within "the operation of the statutes of registration, as re- "spects the rights of creditors. That is, if the creditor "of the party holding the legal title should attempt to "subject the land to the payment of his debt, the rule "applied in Grace vs. Wade, 45 Tex. 522; Grimes vs. "Hobson, 46 Tex. 416, and other like cases, to the effect "that an unrecorded deed is void against a creditor who "has acquired a lien upon the land without notice, has "no application.

"As a general proposition, a judgment lien only "attaches to the actual interest of the debtor in the "land; but on account of our registration laws, ordi- "narily, if the judgment lien attaches before the cred- "itor has notice of the existence of the unrecorded "deed, then such deed is subordinated to the lien, and "subsequent notice of the existence of the deed would "work no change in the rights of the parties. But when "the debtor holds the legal title in trust for others, "with whose funds and for whose use it was purchased, "then if the purchaser at sheriff's sale, made by virtue "of such judgment, has notice of the rights of the "*cestui que trusts* before his purchase, he would ac- "quire no title to the property as against them. *This* "*distinction results from the fact that such an equit-*

"able right is not subject to or governed by the registra-
"tion statutes."

Calvert vs. Roche, 59 Tex. 463-464, 465.

"That resulting trusts are not subject to the regis-
"tration laws is not an open question in this state."

Parker vs. Coop, 60 Tex. 111-116.

"In Grace vs. Wade, 45 Tex. 528; Borden vs. Mc-
"Rae, 46 Tex. 396; Ayers vs. Duprey, 27 Tex. 596;
"Wallace vs. Campbell, 54 Tex. 90, and perhaps in some
"other cases that have escaped our observation, it has
"been held that, by force of our registration laws, a
"lien acquired by a judgment or the levy of an execu-
"tion on the real estate of the debtor is superior to
"the legal title which had been, previous to the date
"of the lien, conveyed by him by deed to a third party,
"but which deed had not been recorded, and of which
"the creditor, at the date his lien was fixed, did not
"have actual notice; and further, that this superiority
"was not affected by the fact that actual notice of the
"unrecorded deed may have been given at or before the
"day of sale. * * * * *

"The lien, however, it must always be borne in
"mind, in considering these cases and all cases of a like
"character, prevails over the unrecorded deed, *alone*
"by force of and by virtue of the registration laws.

"These decisions only apply to cases where the
"third party to be affected by the unrecorded convey-
"ance acquired thereby the *legal title;* or where his
"right or interest is represented by some written in-
"strument, that is required or permitted by law to be
"recorded, and which he has neglected to record, and
"of which the judgment creditor had no actual *notice*
"at the date of the acquisition of his lien.

"This court has never held that the doctrines above
"announced applied to cases where the rights of a
"third party, as in this case, for example, claiming
"through or under the judgment creditor, were purely
"equitable in their character, and which were not in
"their nature susceptible of registration, when actual
"notice of such equitable title was brought home to the
"purchaser before the sale and purchase."

Santer & Co. vs. Lambeth, et al., 59 Tex. 259-262,
263.

"This doctrine (that of Grace vs. Wade) is only
"applicable to such judgment liens and others recog-

"nized as subsisting liens in law. It would be a most "dangerous doctrine if extended and applied to *quasi* "judgment and *quasi* charges upon land. That doc- "trine should not be extended to other than the cases "embraced in the original rule."

Bradley vs. Love, 60 Tex. 372-378.

The appellants are not subsequent purchasers for a valuable consideration. So far as they are purchasers, they are purchasers without valuable consideration; hence, they are not within the protection of paragraph 749.

"It is the well settled law of this court that an exe- "cution lien will hold good as against an unrecorded "conveyance previously made to a third party by the "judgment creditor. Ayers vs. Duprey, 27 Tex. 594; "Grace vs. Wade, 45 Tex. 522; Borden vs. McRae, 46 "Tex. 396; Parker vs. Coop, 60 Tex. 111; Grimms vs. "Hobson, 46 Tex. 416. Hence, where such a lien has "been secured without notice, the purchaser at the sale "made under the execution is protected in his title, "whether he have knowledge of the unrecorded instru- "ment at the time of his purchase or not. * * *

"But as a resulting trust is not within the regis- "tration laws, and the holder of this equity cannot "spread his title upon record, these rules are inappli- "cable to this case. Parker vs. Coop, 60 Tex. 111. "Hence a creditor claiming a mere statutory lien by "judgment or execution has been held by this court "not to be protected by reason simply of want of notice "of such an equity. * * * *

"Hence, also an execution or judgment lien, ob- "tained without notice of the resulting trust, cannot "inure to the benefit of one buying at the sheriff's sale "made under the execution.

"The title of the latter as against the resulting trust "must be determined without reference to any notice "of it at the time of the record of the judgment or the "levy of the execution. It must depend upon whether "or not he had notice at the time of sale, and if not, "then whether or not he was a purchaser for valuable "consideration.

"As Thompson bought the property in controversy "without notice of Mrs. McKamey's title, the only ques- "tion for our decision is: Was he a purchaser for val- "uable consideration, having paid the amount of his "bid by crediting it upon his judgment against the "defendant in execution?"

After a full review of the authorities the court holds that such a purchaser is not a purchaser for a valuable consideration and consequently is not entitled to the protection of the recording act whether he has notice of the prior lien or not.

McKamey vs. Thorp, 61 Tex. 648-651, 652.

"Resulting trusts are not affected by the laws reg-"ulating registration, but it has been constantly held "that a purchaser from the apparent holder of the legal "title, who buys and *pays for* the property without "notice of the equitable right, will be protected against "it."

Allday vs. Whitaker, 66 Tex. 669, 673.

The same court has held that a purchaser of land at sheriff's sale, who bought for the purpose of securing a pre-existing judgment in his own favor, and who paid for the land by a credit of his bid upon the judgment, is not a *bona fide* purchaser for value, in legal contemplation, and takes subject to an unrecorded vendor's lien whether he had notice of it or not.

Orme vs. Roberts, 38 Tex. 768.

"The statute protecting creditors against prior un-"recorded conveyance cannot mean to place a judgment "creditor in any better position when he obtains his "judgment than he is in after the land has been sold "and he buys it on his judgment. Such an interpreta-"tion of the law would have no foundation in reason "or justice to stand on."

Farley vs. McAlister, 39 Tex. 602-603, 604.

A purchaser at an execution sale, who pays the amount of his bid by crediting the judgment foreclosing a mortgage which is owned by his ward, is not a purchaser for value.

Delespine vs. Campbell, 52 Tex. 4.

"The appellant as a purchaser at execution sale, "crediting the amount of its bid on its judgment, is not "to be deemed a purchaser for value."

Aultman Miller & Co. vs. George, 12 Tex. Civ App. 457-459.

A creditor who purchases land at an execution sale, under his judgment, and merely credits the amount

of his bid on the judgment, is not a bona fide purchaser for value as against the rights of third persons.

Cobb & Avery vs. Trammell, 9 Tex. Civ. App. 597.

Plaintiff not being a purchaser for valuable consideration at his own execution sale of the land, it was immaterial whether or not he had notice at that time of the resulting trust in the land then existing in favor of the defendant children.

Hicks vs. Pogue, 33 Tex. Civ. App. 333.

The foregoing cases, we think, clearly demonstrate the doctrine that under the registration statute of Texas, which was adopted by the Territory of Arizona with the construction placed upon it by the courts of Texas, a purely equitable interest such as that of the appellee in the case at bar, is not within the protection of the act. As to such an interest the law of Arizona is the same as that of almost every state in the union, namely:

"The rights of an attaching creditor to property at-
"tached must be determined by the state of the title
"at the time the attachment was made, and in the ab-
"sence of fraud he only obtains the rights which the
"debtor had in the property at that time."

(4 Cyc. 632, 76—Cases cited.)

The appellants cannot claim the protection of the statute as creditors, nor can they claim its protection as purchasers for a valuable consideration without notice, because they are not purchasers for a valuable consideration. It would seem therefore to be immaterial whether or not at the time of their purchase they had actual or constructive notice of the appellee's claim. The Supreme Court of Arizona, however, found, and we think rightly, that: "The Lukes were put upon inquiry and by dili-

"gence could have ascertained before the sale the rights
"of Smith in the premises. The complaint advised
"them that Smith and Rainey had a contract in writ-
"ing which Smith claimed gave him a lien upon the
"land." (Transcript of Record, page 36.)

We now come to the consideration of the third Assignment of Error.

Third.

The court did not err in holding that the appellants had notice of Smith's partner's lien prior to their purchase of the premises in controversy at the sheriff's sale, and that

such notice rendered such purchase subject to such alleged partner's lien.

The rule is elementary that where a party has sufficient notice to put him upon inquiry and he neglects to make such inquiry, he is chargeable with knowledge of all facts, to which that inquiry would have led. In the case at bar the appellants were apprized, at the commencement of this action, by the original complaint filed therein, that Smith claimed a lien upon Rainey's interest in this land; that he claimed this lien by virtue of a written contract between himself and Rainey, and that he claimed that his lien was prior to that of the appellants. The appellants now insist that the lien was designated in the original complaint as an equitable mortgage, whereas, in fact, it was the lien of a partner upon the partnership assets; that the provisions of the agreement set forth in the original complaint did not disclose the existence of a partnership, and that they were not apprized of the true nature of the lien until the filing of the last amended complaint, which was some time after they had purchased at the sheriff's sale on their own execution. On page 26 of appellants' brief we find a quotation from Converse vs. Blumrich, 14 Mich. 108-120. That case was an action to foreclose a mortgage; it was defended on the ground that the plaintiff had procured its execution by false and fraudulent misrepresentation; it was claimed that defendant was chargeable with constructive notice of the facts claimed to have been misrepresented, because having the means of knowledge he failed to make use of them. The facts were peculiarly within plaintiff's knowledge. In procuring the mortgage, the foreclosure of which was sought, he denied their existence. It was with reference to this state of facts that the court used the language quoted on pages 26 and 27 of appellants' brief.

The case of Dickey vs. Henarie, cited on page 27 of appellants' brief, manifestly fails to sustain the appellants' position in the case at bar. There, a tenant in possession, gave notice at the sheriff's sale that he had a sub-lease on a cigar store; he did not give notice that this lease gave him the exclusive right to sell tobacco and cigars in the whole of the building. The court held that the purchaser was not chargeable with notice of this provision of the lease. In the case at bar the original complaint expressly informed the appellants that the appellee claimed a lien upon Rainey's interest in the premises in question and that it was prior to appellants' lien. If they did not so construe the writteen instrument, or so much of it as was set forth in the complaint, it was their duty to ask for a copy of it in order that they might be fully advised of its legal significance. This they failed to do.

The cases cited by the learned Supreme Court of Arizona, in its opinion in the case at bar (Transcript of Record, pages 35 and 36), amply sustain the conclusion of that Court, that in the case at bar, the appellants had constructive notice of appellee's claim at the time they purchased Rainey's interest in the premises in question, at their own sheriff's sale.

In the case of Vredenburgh vs. Burnet, 31 N. J. Equity, 229, the Court, in discussing the question of sufficiency of notice of an arrangement, whereby two mortgages appearing on the record as concurrent liens, were made one subordinate to the other, said, on page 233:

> "He (defendant) admits notice of the arrangement; "he complains simply because he did not know that it "was understood that the complainant's mortgage "should be the first lien on the vacant lot as well as "the other. NOTICE OF ANY PART OF THE AR- "RANGEMENT WAS SUFFICIENT, IN MY "JUDGMENT, TO PUT UPON HIM THE DUTY OF "SEEKING FULL INFORMATION OF THE HOLD- "ER OF THE OTHER MORTGAGE, AND IF HE "FAILED TO PERFORM IT AND LOSS ENSUED, "HE MUST BEAR IT AS THE CONSEQUENCE OF "HIS OWN FAULT. Whatever puts a party upon in- "quiry, amounts, in judgment of law, to notice, pro- "vided the inquiry became a duty, as in the case of pur- "chasers and creditors, and would lead to the knowl- "edge of the requisite fact by the exercise of ordinary "diligence and understanding."

It must be very evident to this Court that the appellants had sufficient notice to put them on inquiry as to the claims of the appellee. The fact that they proceeded to sell the property under their judgment and purchase it for themselves in their own name, without making the necessary inquiry as to the contents of the contract and agreement referred to in the pleadings upon which appellee based his claim to a prior lien, is sufficient to place them in the position of purchasers with full knowledge of all of the facts surrounding Smith's claim, and therefore places them without the category of "Innocent Purchasers." We insist that there can be no doubt that the Supreme Court of Arizona was right in holding that the appellants had notice of the appellee's partner's lien prior to their purchase of the premises at the sheriff's sale, and that such notice rendered such purchase subject to such partner's lien.

Fourth.

The Court did not err in holding that paragraph 2703, Rev. Stat. Ariz 1901, is not applicable to the facts in this case.

That section provides that: "If any person shall do or trans-

> "act business as a merchant or trader, with the addi-
> "tion of the words agent, factor or company, or and Co.,
> "or words of like significance or import, and shall fail
> "to disclose the name of his principal or partner or
> "other person who may be interested in such business
> "by a sign in letters easy to be read, placed conspicuous-
> "ly at the place where such business is transacter; or if
> "any person shall transact business in his own name,
> "without any such addition, all the property, stock,
> "money and choses in action, used or acquired in such
> "business, except such property as may be exempt from
> "execution, shall, as to the creditors of any such per-
> "son, be liable for his debts, and be, in all respects,
> "treated in favor of his creditors as his property;
> *"Provided,* That this title shall not apply to copart-
> ners who have complied with the provisions of title
> "51 of the revised Statutes of Arizona."

There is no finding in the case at bar that either Rainey or the appellee did any business whatever in Arizona as a merchant or trader with the addition of the word agent, factor, or company, or and Co., or words of like significance or import, or that Rainey failed to disclose the name of his principal, or partner, or other person who might be interested in such business. There is no finding that either Rainey or appellee ever had any place of business in Arizona, or that they ever transacted any business there, other than the joint purchase of the particular parcel of land in question. The purchase of that tract of land was certainly not doing business as a merchant or trader. We fail to understand how counsel can seriously contend that this statute is applicable to the case at bar.

Appellants' counsel on page 20 of appellants' brief says:

> "It seems to us that this statute is conclusive of this
> "case, and that the Lukes as creditors of Rainey are
> "directly within its letter and spirit."

We are informed on pages 20 and 21 of appellants' brief, that this section was adopted from the statutes of Mississippi, and that it must be held to have been adopted with the construction placed upon it by the courts of that state. And that such

is the law we do not dispute. The appellants' counsel have cited two Mississippi cases holding that the object of the statute was to prevent the assertion of secret claims to property as against creditors of the person who seems to be the owner of it. Also to a case holding that where a party transacted business in his own name, displaying no sign indicating that another had any interest in the business; that the property in question was used and acquired in that business, it is liable for the debts created by the person so transacting the business. There is no finding in the case at bar that Rainey or appellee ever had a place of business in Arizona; that he ever displayed any sign whatever in that territory, or ever incurred any liability respecting the property in question.

There is no finding or pretense in the case at bar that the appellants' judgment against Rainey was recovered upon a debt in any manner connected with the property in question.

Fifth.

The Court did not err in affirming the decree of the trial court directing the sale of Rainey's one-third interest in the property in controversy in satisfaction of the claim of Smith against the alleged partnership of Smith and Rainey.

The Fifth Assignment of Error needs no argument. If we are right in the first four propositions discussed, it follows, as a matter of course, that the court could have entered no other judgment than the judgment from which this appeal is taken.

REVIEW OF AUTHORITIES CITED BY APPELLANTS.

On page 9 of appellants' brief we find a number of cases cited in support of the proposition that, "Real property con-

> "veyed to one member of a partnership, and standing "of record in his name in which conveyance and record "the other partner participates and acquiesces, though "purchased with money advanced to the partnership "by such participating and acquiescing partner, is sub- "ject to attachment and execution by the creditors of "the partner holding such record title, who have no "notice of such partnership, and the lien of such at- "taching and execution creditors is prior and superior "to the equitable right of such consenting and acquiesc- "ing partner to have the partnership property applied "to the payment of his advances to the partnership."

The Pennsylvania cases cited in support of this proposition are the only ones which in fact sustain it, and so far as we have

been able to ascertain by diligent search, the Supreme Court of Pennsylvania is the only court in the United States which has laid down the law as cited in the appellants' brief. The doctrine is diametrically opposed to that laid down by this court in the case of *Shanks vs. Klein*, 104 U. S. 18.

Blake vs. Nutter, 19 Me. 16. This case merely holds that:

> Real estate purchased with partnership funds for partnership purposes, and so used and enjoyed, is held by the members of the firm as co-tenants—and the superior right of the partnership creditors over the creditors of the individual partners does not apply *at common law* to real estate thus purchased.
>
> Whether a different rule in equity should be adopted—quaere.

In a more recent case the same court held that,

> Where the creditors of one of the members of a copartnership had instituted suits at law against him, and attached his *legal* interest in real estate thus conveyed, intending to levy thereon to satisfy their judgments, when rendered, the Court, in the exercise of its chancery powers, will interpose to protect the rights of the other partners, when the estate attached will be required to pay the debts of the firm (including the firm's liabilities to its individual members), and, if without it, the partnership will be insolvent.
>
> *Crooker vs. Crooker*, 46 Me. 250.

Hammond vs. Paxton, 58 Mich. 393. (Erroneously cited in appellants' brief as Hammond vs. Palton.) In this case a bill

> was filed on March 24, '73, together with a notice of lis pendens, to have certain land adjudged partnership property and subjected to the payment of partnership indebtedness, April 9, 1873, an order was entered by defendants' solicitor, dismissing the bill for want of prosecution. On April 15, 1873, the defendants gave the note and mortgage in suit. On April 18, 1873, another bill was filed containing the same charges as were contained in the bill which had been dismissed and judgment was subsequently entered, declaring the land in question partnership assets. It was claimed that the mortgagee in the mortgage of April 15th was bound by the notice of lis pendens filed in the suit which was dismissed. The Court held that he was not so bound, because, although the decree dismissing the

bill of complaint in the first action was irregularly entered, nevertheless in order to affect a purchaser or encumbrancer with constructive notice the suit must be prosecuted with reasonable diligence, and a neglect to do so will relieve a purchaser without actual notice from the effect of this lis pendens, if the suit be abandoned, or no decree be entered therein, the purchaser is not affected by the filing of the notice.

Forde vs. Herron, 4 Munf. 316. This was a case where a partner, being the holder of the *legal title* to an undivided one-half of certain real estate conveyed his moiety to secure his individual debt to one having no notice that it was in fact partnership property. The conveyance was duly recorded. The Court held that his grantee took title free from the claim of the other partner.

Buchan vs. Sumner, 2 Barb. Ch. 165. (Erroneously cited by appellants' counsel as Buchan vs. Tumver, 2 Barb. 165.) In that case the court uses the following language, pp 206-207:

"Although a court of equity considers and treats "real property as a part of the stock of the firm, it "leaves the legal title undisturbed, except so far as is "necessary to protect the equitable rights of the several "members of the firm therein. And in the present case, "Sumner was the owner of the one-half of the mort-"gaged premises, subject to the equitable lien of his "co-partner thereon, for one-half of the debts which "the latter was obliged to pay, subsequent to the disso-"lution of the firm; the personal property of the co-"partnership having been disposed of at the time of "such dissolution. That prior equitable lien, how-"ever was paramount to the subsequent legal lien of "the appellant, by virtue of his judgment. For the "separate creditors of the individual partners have no "equitable right, to any part of the partnership prop-"erty, until the debts of the firm are provided for, and "the rights of the partners as between themselves fully "protected." * * * *

"The lien which the appellant, in this case, had "obtained, upon the legal title of his judgment debtor, "in one-half of the equity of redemption in the mort-"gaged premises, by the prior docketing of his judg-"ment, must therefore yield to the superior as well "as prior equitable claim of Naylor, upon the same "equity of redemption as partnership property. For "the general lien of a judgment creditor, upon the

"lands of his debtor, is subject to all equities which "existed against such lands, in favor of third persons, "at the time of the recovery of the judgment. And the "court of chancery will so control the legal lien, of "the judgment creditor, as to restrict it to the actual "interest of the judgment debtor in the property; so "as fully to protect the rights of those who have a prior "equitable interest in such property, or in the pro- "ceeds thereof."

First Nat'l Bank vs. State Sav. Bank, 89 N. W. 941.

In this case the record title to the land in question was, as in the case at bar, in the two partners as tenants in common, although in fact partnership property. After the death of one of the partners, the surviving partner made a contract with one of the defendants to sell him the land for $600; the contract was not recorded. The defendant bank caused a levy to be made upon the land December 19, 1894. Prior to that date the surviving partner had made deeds under which complainant claimed title; these deeds were not recorded until after the defendants' levy. The Court held the levy prior to the deeds under a statute of Michigan, which provides that "the lien "thus obtained shall be valid against all prior *grant-* "*ees* and *mortgagees* of whose claims the party in- "terested shall not have actual or constructive no- "tice."

Alexander vs. Thompson, 111 N. W. 385-386. The facts in this case are as follows:

On February 13, 1888, the record title in fee of the land was in George J. Day, and so remained until June 15, 1888, when he conveyed it by warranty deed to Olaf Noren, who gave a mortgage thereon to secure a loan to the plaintiff. This mortgage was duly foreclosed, and the land sold to the plaintiff by virtue thereof. No redemption was ever made from the foreclosure sale. The deed and mortgage were duly recorded on July 3, 1888. Thereafter, the defendant brought an action in which he was plaintiff and George J. Day and others were defendants, to dissolve a partnership theretofore existing between himself and Day, and to have the deed and mortgage cancelled. The plaintiff was a purchaser for value without notice of the alleged equitable lien of Thompson.

On these facts the Supreme Court of Minnesota very properly held, that the plaintiff's title was superior to that of Thompson.

On page 9 of appellant's brief we find the proposition stated that,

> "By participating and acquiescing in the convey-
> "ance to Rainey of an undivided one-third interest in
> "the real estate which he advanced the money to pur-
> "chase, and by participating and acquiescing in plac-
> "ing such title in Rainey of record, and with notice
> "and without protest permitting Rainey to mortgage
> "the property, and otherwise publicly treat it as his
> "own individual property, the plaintiff, Smith, waived
> "all right to claim a lien upon said premises prior and
> "superior to that of the attachment and judgment
> "creditors of Rainey, who became such upon the faith
> "and credit of such record title, and without notice of
> "the fact of the existence of such partnership or the
> "making of such advances."

In support of this proposition, the appellants' counsel cites R. S. Ariz. par. 753; Ford vs. Herron, supra, and Wilhite vs. Boulware, 88 Ky. 160.

Paragraph 753, R. S. Ariz., provides that,

> "The record of any grant, deed or instrument in
> "writing authorized or required to be recorded which
> "shall have been duly acknowledged for record and
> "duly recorded in the proper county shall be taken and
> "held as notice to all persons of the existence of such
> "grant, deed or instrument."

We understand appellants' counsel to argue that paragraph 753, R. S. Ariz., above quoted, charges the appellee with constructive notice of the mortgage executed by Rainey to one Hubbard. (Transcript of Record, page 50, folio 98.)

The Supreme Court of Arizona, in its opinion in the case at bar, states:

> "There is no evidence, however, that Smith knew
> "anything of this mortgage, and we do not think that
> "the record operated as constructive notice to him."
>
> (Transcript of Record, p. 36, folio 71.)

Paragraph 753, as well as 749, was adopted from the Statute of the State of Texas, and must, of course, be deemed to have been adopted with the construction placed upon it by the courts

of that state. The Supreme Court of Texas, in construing this statute, used the following language:

> "The proposition is frequently announced that "under the registration laws the proper record of an "instrument authorized to be recorded is notice to all "the world. Although the language of Article 4652" (which is the same as Paragraph 753, R. S. Arizona) "of the revised statutes gives countenance to "the doctrine as thus broadly stated, it has been de- "cided by this court that the proposition is subject "to important qualification. For example, in Holmes "vs. Buckner, 67 Tex. 107, 2 S. W. 452, the Court quote "with approval the following language: 'The regis- "try of a deed is notice only to those who claim through "or under the grantor by whom the deed was exe- "cuted.' The doctrine was applied in the decision "of that case, and the decision has been followed in "subsequent cases. Lumpkin vs. Adams, 74 Tex. 96, "11 S. W. 1070; Jenkins vs. Adams, 71 Tex. 1, 8 S. W. "603; Frank vs. Heidenheimer, 84 Tex. 642, 19 S. W. "855. So, also, it is held in other jurisdictions that "the record of a deed or mortgage is notice to sub- "sequent purchasers from the same grantor, but not "to prior purchasers. Doolittle vs. Cook, 75 Ill. 354; "Stuyvesant vs. Hall, 2 Barb. Ch. 151. In the case "last cited the Court says: "The whole subject of "the recording acts is to protect subsequent purchas- "ers and incumbrancers against previous deeds, mort- "gages, etc., which are not recorded; and to deprive "the holder of the prior unregistered conveyance or "mortgage of the right which his priority would have "given him at the common law. The recording of a "deed or mortgage, therefore, is constructive notice "only to those who have subsequently acquired some "interest or right in the property under the grantor "or mortgagor." The decisions of our Court above "cited establish a rule of property, and we need not "stop to inquire whether they are correct or not."

White vs. McGregor, 50 S. W. 564-565.

That this is the general doctrine is established by the following cases:

Garrett vs. Simpson, 115 Illinois, App. 62.
Bates vs. Norcross, 14 Pickering, 224.
Leach vs. Beatties, 33 Vermont, 195.

Maul vs. Rider, 59 Pa. St. 167.
Chowan vs. Phelps, 26 Mont. 524.
Building Association vs. Fellers, 96 Va. 337.

In the case last cited, the Court used the following language:

> "It is true, we think, as stated by counsel, that "this Court has never passed upon that question, but "it is well settled, both upon principle and authority, "that the registry of a deed by a subsequent pur- "chaser is no notice to parties who have acquired "their rights before the time when the deed is reg- "istered. Neither the language nor the policy of the "registry acts was intended to affect the holder of "antecedent rights, but only such persons as are com- "pelled to search the record in order to protect their "own interests."

It is therefore clear that the record of a mortgage executed by Rainey subsequent to the acquisition of the title to the premises in question by Smith and Rainey is not constructive notice to the appellee that Rainey was dealing with his interest in this property as though it were his individual property. There is no pretense that appellee had actual notice of the existence of such mortgage.

> *Wilhite vs. Boulware*, 88 Ky. 169. This case expressly recognizes the equitable lien of a partner upon the partnership property, but holds that the real estate in question was *not* such property.

On page 9 of appellants' brief, we find the proposition announced that:

> "Even when a partner is entitled to a lien, he may "waive it, or by his conduct lose its benefit."
> 30 Cyc. 701.

It is doubtless true that a partner, like any one else may waive any right which he may have. We submit, however, that there are no facts in the case at bar tending to show that the appellee, in the case at bar, ever did waive any such right.

The cases cited in Note 28, 30 Cyc. 701, clearly indicate the conduct which will amount to such a waiver.

> *Robertson vs. Baker*, 11 Fla. 192. Lien lost by partitioning the property between the partners, the

creditor partner taking a mortgage on the assets which were turned over to the debtor partner.

Kemmerer vs. Kemmerer, 85 Iowa, 193. Lien lost by the creditor partner's sale of his interest in the firm and of his judgment against the debtor partner.

Wishek vs. Hammond, 10 N. D. 72. Lien lost by assenting to a division of the assets between the partners.

The Court will readily see that in the case at bar the appellee has done nothing which can possibly be construed as a waiver of any rights which he may have had in the property in question.

The cases as cited on page 10 of appellants' brief all relate to the priority of the lien of a judgment over that of unrecorded deeds or mortgages, which instruments are clearly within the protection of paragraph 749, R. S. Arizona.

On pages 10 and 11 of appellants' brief, we find the statement that:

> "The Supreme Court of Texas stands alone in its "opinion that secret equities are not within the pro- "tection afforded to judgment creditors by the re- "cording acts."

That this is not true we have already shown; if true, however, the decisions of that Court must control the decision of the case at bar.

On page 11 of appellants' brief, we find the statement that:

> "The Federal Courts made no distinction between "secret equities and unrecorded deeds regarding the "time of notice of their existence as affecting pur- "chasers at execution sales."

The authorities cited by appellants' counsel in support of this proposition wholly fail to sustain it. To review these cases in detail would extend this brief to unnecessary length.

On page 29 of appellants' brief, counsel urges the proposition that:

> "The trust must result, if at all, at the instant the "deed is taken, and the legal title vests in the "grantee."

And counsel argues that, in the case at bar, no trust resulted for the benefit of the partnership, because the agreement upon which the appellee bases his cause of action was not actually executed until a month after the deed conveying the legal title to the premises in question to the appellee and Rainey.

The agreement itself will be found on pages 7, 8 and 9, Transcript of Record; it bears date the 20th day of March, 1897, the same date borne by the deed conveying the legal title to the premises to the appellee and Rainey; it recites in detail the terms and conditions upon which the purchase was made. So far as the appellants are concerned, it is immaterial whether the agreement was ever reduced to writing. That it was in effect from the moment the title was conveyed to the appellee and Rainey there can be no doubt, from the facts disclosed by the record in this case.

On page 19 of appellants' brief, we find the statement that:

> "Appellee, without protest, permitted Rainey to "treat the title thus conveyed to him as his own, by "executing and recording a mortgage thereon to A. "G. Hubbard for $3,000, in which mortgage Rainey "declared himself to be the exclusive owner of said "undivided one-third interest, with good right and "lawful authority to convey and mortgage the same, "with full covenants of warranty. He permitted the "title so conveyed to Rainey to so remain of record "that upon the faith and credit thereof the Lukes so " dealt with Rainey that he became indebted to them, "and with the contract in writing constituting him-"self a partner with said Rainey in respect to said "premises in his exclusive possession capable of being "recorded, he kept it off the record and concealed "until the rights of the appellant had become fixed "and their lien perfected by attachment and judg-"ment."

We submit to the court that this statement is wholly without foundation in the record. There is no finding, nor was there any proof, that appellee ever knew of the execution of the mortgage by Rainey to Hubbard, by which Rainey conveyed his one-third interest to Hubbard to secure a loan for $3,000. It needs no argument to demonstrate that appellee is in no way responsible for any covenants made by Rainey in that mortgage.

There is no finding, nor was there any proof, that the appellants dealt with Rainey upon the faith and credit of his ownership of this property; nor is there any finding, nor was there any proof, that at the time the indebtedness from Rainey to the appellants was incurred, the appellants even knew that Rainey had any interest in the property in question.

Nor is there any finding or proof, that the appellee knew of the indebtedness of Rainey to the appellants until the commencement of the present action.

Should this court reverse the judgment in the case at bar, it would result in giving to appellants for the paltry sum of $2,500 property for which their judgment debtor paid nothing and which cost the appellee, up to the time that the judgment was entered in the Court below, over $28,000. Appellants' counsel seems to take the view that it is the duty of a *court of equity* to accomplish the result above indicated. We do not believe that a court of equity ought to or will permit such an iniquitous judgment.

We submit that the judgment of the Supreme Court of Arizona must be affirmed.

LEWIS M. OGDEN,
Counsel for Appellee.

LUKE *v.* SMITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 150. Argued January 27, 1913.—Decided February 24, 1913.

The Supreme Court of the Territory of Arizona having, in construing the recording statute, followed the decisions of the courts of Texas from whose laws the statute was copied, and held that one buying with notice that the holder of the legal title held it in trust for others took with notice notwithstanding the act, this court sees no reason for not following the general rule that it will follow the construction given by the local court to a local statute.

Service of the complaint in an action brought to establish an equitable lien on property superior to the rights of all parties defendant is notice to a defendant having knowledge of the suit.

13 Arizona, 155, affirmed.

THE facts, which involve the construction of the recording act of Arizona and what constitutes notice of lien to a purchaser of real estate, are stated in the opinion.

Mr. Walter Bennett for appellants.

Mr. Lewis M. Ogden for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the appellee to establish and foreclose a lien on certain land, and already has been before this court. *Smith* v. *Rainey*, 209 U. S. 53. At that hearing the land was decided to be partnership assets as between Smith and Rainey and as such subject to a lien for repayment of advances made to the firm by Smith. The present appellants claim a right in Rainey's interest, paramount to Smith's, by virtue of an execution sale on a judgment against Rainey. The material facts are few. The title to the land by deed on record stood in Smith as to two undivided thirds and in Rainey as to the other third. About April 29, 1897, Smith and Rainey made the agreement construed in 209 U. S. 53, out of which arose the partnership and the consequent lien before mentioned. On June 11, 1902, the appellants began a suit against Rainey upon an individual debt of his and attached his interest in the land. On June 11, 1903, they got judgment. On July 18, 1903, Smith began the present action making Frank Luke a defendant as claiming some lien alleged by Smith to be subordinate to his own. On August 6, 1903, an order of sale was issued in the suit of the appellants, on September 8 the land was sold to the Lukes for the amount of their judgment, on December 29 the sheriff made return, and on June 20, 1904, there having been no redemption, executed a deed to the Lukes. The Lukes had no notice of Smith's rights earlier or other than that derived from the beginning of the present suit.

The statute of Arizona makes all conveyances of land and all deeds of trust and mortgages void, as against creditors and subsequent purchasers for value without notice, unless recorded, but leaves them valid as against purchasers with notice or without valuable consideration.

Rev. Stat., 1901, Paragraph 749. The Supreme Court of Arizona, starting from the admitted fact that the statute was copied from the laws of Texas, after examining the Texas decisions concluded that when the debtor holds the legal title in trust for others with whose funds and for whose use it was purchased, a purchaser at a sale on execution who has notice of their rights before his purchase will take subject to them notwithstanding the foregoing act. The court thought that the principle applied to such equitable rights as Smith was decided to have, in 209 U. S. 53, and hence concluded that if the Lukes had notice before the sale on September 8, 1903, from the original complaint in the present suit, Smith must prevail. On this construction of a local statute as well as on some subordinate matters of construction not so much pressed, we see no reason for not following the local court in accordance with a leaning many times declared. *Jones* v. *Springer*, 226 U. S. 148, 157. *Gray* v. *Taylor*, *ante*, p. 51. It is perhaps doubtful whether the instrument creating the partnership and making the land partnership assets could have been recorded; assuming, as the appellants urge, that the test of trusts that are outside of Paragraph 749 is that they do not arise from an instrument that might be put on record—a test not definitely accepted by the Arizona court. Some mention was made of a mortgage executed by Rainey and afterwards discharged as giving additional color to Rainey's record title. But it is enough to say that the Lukes do not appear to have known of it before the execution sale to them.

Hence the only question is whether the complaint as originally filed gave notice of Smith's rights. It did not set forth the contract, but alleged it to have been made in writing and alleged that it was agreed that the plaintiff should advance all the money necessary for the improvement of the land and should be repaid all sums advanced by him for that purpose or for the purchase of the land,

&c., with interest, from sales of the land. It prayed that the plaintiff be declared to have an equitable mortgage lien upon Rainey's interest, paramount to Luke's title whatever it might be. This obviously was enough to put the Lukes upon inquiry as to the precise character of a contract that was alleged, and truly alleged as it turns out, to lay the foundation for an equitable interest superior to theirs.

Judgment affirmed.